SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~657~~ 20

CARNATION COMPANY, PETITIONER,

vs.

PACIFIC WESTBOUND CONFERENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 30, 1965

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

[fol. 2]

41153

DATE			FILINGS—PROCEEDINGS
1962			
Dec	5	1	Filed complaint, issued summons
	6	2	Filed order appointing W. J. Kelley of San Francisco, Calif. for the purpose of serving summons in this action (Weigel)
	21	3	Filed summons, executed as to American Mail Line, Ltd., Daido Kaiun Kaisha, Ltd., The East Asiatic Company, Ltd., Nippon Yusen Kaisha, a/k/a N.Y.K. Line, Pacific Westbound Conference, States Steamship Co., United States Lines Co. Dec. 6, 1962; American President Lines, Ltd., Far East Conference, Fern-Ville Far East Lines—Fearnley & Eger, A. F. Klaveness & Co. A/S, Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard, Fearnley & Egers Befragtningsforretning A/S, HNO Kaiun Kaisha, Ltd., Java Pacific & Hoegh Lines—Joint Service, N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd, N. V., Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Nor-

DATE		FILINGS—PROCEEDINGS
1962		
Dec 21 (Cont)	3	enga, Skibsaktieselskapet Abaco, A/S Atlantica, Kawasaki Kisen Kaisha, Ltd., Klaveness Line-Joint Service, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskapet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Knutsen Line-Joint Service, Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka, Hvalfangstaktieselskapet Suderoy, Lykens Bros. S.S. Co. Inc., A. P. Moller-Maersk Line-Joint service, Dampskibsselskabet AF 1912, Aktieselskabet Dampskibsselskabet Svendborg, Nitto Shosen Co. Ltd., Pacific Far East Line, Inc., Pacific Transport Lines, Inc., Shinnihon Steamship Co., Ltd., Transocean Transport Corp. (sometimes d/b/a Magsaysay Lines), United Philippine Lines, Inc., and Yamashita Kisen Kaisha December 7, 1962; as to Isthmian Lines, Inc.; Mitsubishi Kaiun Kaisha, Ltd., Mitsubishi Shipping Co. Ltd., Kokusai Line-Joint service, Mitsui Steamship Co., Ltd., Nippon Kisen Kaisha, Ltd. (sometimes d/b/a Nissan Pacific Line), Nissan Kaisen Kaisha, Ltd., Osaka Shosen Kaisha, Ltd., Prince Line Ltd., States Marine Corp., States Marine Corp. of Delaware, States Marine Lines, Inc. (a/k/a Global Bulk Transport Corp.), Waterman Steamship Corp., Wilhelmsens Dampskibsak-

DATE		FILINGS—PROCEEDINGS
1962		
Dec 21 (Cont)	3	tieselskab, A/S Den Norski Afrika-Og [fol. 3] Australieline, A/S Tonsberg, A/S Tankfarti I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, December 10, 1962; as to Maritime Co. of the Philippines, Inc., Orient Mid-East Lines, Pacific Orient Express Line-Joint Service, Skipsaktiesselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet Skagerek (Ditley-Simonsen Lines), Transatlantic Steamship Co. Ltd. of Gotbenburg and Philippine National Lines December 11, 1962; as to Canadian Pacific Ry. Co., De La Rama Lines-Joint Service, The De La Rama Steamship Co. Inc., The Swedish East Asia Co. Ltd., The Ocean Steamship Co. Ltd., The China Mutual Steam Navigation Co. Ltd., Nederlandschij Stoomvaart Maatschappij "Oceaan" N. V., Ellerman & Bucknall Associated Lines—joint service, Ellerman Lines, Ltd., Ellerman & Bucknall Steamship Co. Ltd., The City Line Ltd. Hall Line, Ivaran Lines-Far East Service-Joint service, Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco, A/S Lise, Orient Steam Navigation Co. Ltd., and P & O Orient Lines December 12, 1962; and Unserved as to The Bank Line, Compagnie De Transports Oceaniques, Compagnie Maritime Des Chargeurs Reunis, James A. Dennean, W. C. Galloway, Kokusai Kain Kaisha, Ltd. and Toho Kaiun Kaisha, Ltd.

DATE			FILINGS—PROCEEDINGS
1962			
Dec	26	4	Filed stip. & Order ext. time for Deft. Pacific Westbound Conference, W. C. Galloway and member carriers, to plead, to Feb. 1, 1963. (Carter)
	26	5	Filed stip. & order ext. time for Deft. Far East Conference and member Carriers to plead, to Feb. 1, 1963. (Carter)
1963			
Jan	4	6	Filed stip. & order ext. time for deft. Canadian Pacific Ry. Co. to plead, to Feb. 1, 1963. (Carter)
	31	7	Filed stip. & order ext. time for Pacific Westbound Conference, W. C. Galloway, Canadian Pac. Ry. and member carriers, to plead, to March 1, 1963. (Carter)
	31	8	Filed stip. & order ext. time for Far East Conference and member carriers to plead, to March 1, 1963. (Carter)
Mar	1	9	Filed stip. & order ext. time for Deft. Canadian Pacific Ry. and East Asiatic Co. to plead, to Mar. 8, 1963. (Harris)
	1	10	Filed stip. & order ext. time for Deft. Nissan Kaisen Kaisha, Toho Kaium Kaisha, Lino Kaiun Kaisha, Mitsubishi Kaiun Kaisha, Kokusai Kaium Kaisha to plead, to Mar. 8, 1963.
	1	11	Filed notice & Motion by Far East Conference to dismiss, Mar. 11, 1963, 10:00 A. M. with supporting memo and copy of proposed order.

[fol. 4]

DATE			FILINGS—PROCEEDINGS
1963			
Mar	1	12	Filed notice & Motion by Pacific Westbound Conference, W. C. Galloway to dismiss, Mar. 11, 1963, 10:00 A.M. with copy of proposed order, and supporting memo.
	1	13	Filed notice & Motion by Federal Maritime Commission to intervene, Mar. 11, 1963, 10:00 A.M. with proposed order attached.
	1	14	Filed memo by Fed. Maritime Comm. supporting mo to intervene.
	1		Lodged proposed answer of Fed. Maritime Comm.
	1	15	Filed notice & Motion by Federal Maritime Commission to dismiss, Mar. 11, 1963, 10:00 A.M. with copy of proposed order attached.
	1	16	Filed memo by Fed. Maritime Comm. supporting mo to dismiss.
	1	17	Filed receipt of service by parties of copies of mos. Mar. 1, 1963.
	5	18	Filed stip. & order ext. time for Carnation Co. to file memo in opposition to motions to dismiss to Mar. 21, 1963; defts. & deft-intervener to reply by Apr. 3, 1963 and hrg. calendared on Apr. 8, 1963. (Weigel)
	5	19	Filed stip. & order ext. time for Carnation Co. to file memo on mo to intervene; interner to reply by Apr. 3, 1963 and hrg. calendared Apr. 8, 1963. Fur. Stip. & order if time for hrg. on mo to dismiss is

DATE			FILINGS—PROCEEDINGS
1963			
Mar (Cont)	5	19	extended, the time for hrg. on mo to intervene will also be ext. to same date. (Weigel)
	5	20	Filed stip. & order of dismissal without prejudice as to defts. Canadian Pacific Railway Company and The East Asiatic Co. Ltd. (Weigel)
	12	21	Filed stip. & order that stip. ext. time to Mar. 8, 1963 for defts. Nissan Kaisen Kaisha, Ltd., Toho Kaium Kaisha, Ltd. Iino Kaiun Kaish, Ltd. Mitubishi Kaium Kaisha, Ltd., Lokusai Kaiun Kaisha Ltd. d/b/a Kokusai Line-Joint Service to plead, was not intended to and is not applicable to any party other than Kokusai Line-Joint Service. (Harris)
	12	22	Filed stip. & order dismissing without prejudice the deft. Kokusai Line-Joint Service. (Harris)
	21	23	Filed memo by Pltff. opposing motions to dismiss.
	21	24	Filed memo by Pltff. objecting to mo of Federal Maritime Commission for leave to intervene as deft.
Apr	3	25	Filed reply brief of defts. Pacific Westbound Conference, et al.
	3	26	Filed reply memo of defts. Far East Conference, et al.
	3	27	Filed reply memo by Fed. Maritime Commission supporting mo to dismiss as to Pacific Westbound Conf.

DATE			FILINGS—PROCEEDINGS
1963			
Apr	3	28	Filed reply memo by Fed. Maritime Commission supporting mo to dismiss as to Far East Conf.
[fol. 5]			
Apr	8		Ord after hearing, motion to dismiss and motion of Fed. Maritime Commission to intervene is *submitted*. (Sweigert)
	30	29	Filed order granting mo of Federal Maritime Commission to intervene Counsel to arrange a hearing time with the Clerk for further argument, if not possible the Court will fix a time. (Copies mailed) (Sweigert)
	30	29-A	Filed answer of Fed. Maritime Commission, intervener
May	27	30	Filed memo of Fed. Maritime Commission, Deft.-Intervener on further argument.
Jun	5	31	Filed suppl. memo by deft. Pacific Westbound Conf. et al. on question raised by Court.
	5	32	Filed memo by deft. Far East Conf. supporting mo to dismiss.
	5	33	Filed memo by Pltff. on further argument of mo to dismiss.
	11		Ord. aft hrg, mo to dismiss stand submitted. (Sweigert)
	21	34	Filed memorandum of opinion. (Motions to dismiss are granted; moving parties to present orders.) (Copies mailed) (Sweigert)
	27	35	Entered order granting mos to dismiss and Judgment of dismissal, filed June 26, 1963, dismissing action. (Harris)

DATE			FILINGS—PROCEEDINGS
1963			
Jul	18	36	Filed notice of appeal by plaintiff.
	18	37	Filed appeal bond, sum of $250.00 by pltff.
	18	38	Filed designation of record on appeal and statement of points to be relied upon on appeal.
	19		Mailed notice of notice of appeal to counsel of record.
	29	39	Filed designation by defts. of additional portions of record on appeal.
Aug	16	40	Filed Reporter's. Trans. mo to dismiss & mo of Fed. Maritime Commiss. for leave to intervene as deft., Apr. 8, 1963.
	22	41	Filed stip. & order for withdrawal of records for duplication. (Weigel)
	22	42	Filed Reporter's. Trans. Fur hrg. on mo to dismiss, Jun. 11, 1963.
	26	43	Filed order ext. time to file record & docket appeal, to Wednesday, Sept. 25, 1963. (Sweigert)

[fol. 6] [File endorsement omitted]

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Dunne & Phelps, 333 Montgomery Street, San Francisco 4, California, Telephone: YUkon 6-4812; Attorneys for Plaintiff, Carnation Company.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Action File No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE and unincorporated association; the following corporations, individually and as members of said associations (as hereinafter ap-[fol. 7] pears): N. V. STOOMVAART MAATSCHAPPIJ "NEDER LAND", KONINKLIJKE ROTTERDAMSCHE LLOYD N. V., SKIBSAKTIESELSKAPET ARIZONA, SKIBSAKTIESELSKAPET ASTREA, SKIBSAKTIESELSKAPET ARUBA, SKIBSAKTIESELSKAPET NORUEGA, SKIBSAKTIESELSKAPET ABACO, A/S ATLANTICA, doing business as JAVA PACIFIC & HOEGH LINES—JOINT SERVICE; SKIBSAKTIESELSKAPET SANGSTAD, SKIBSAKTIESELSKAPET SOLSTAD, SKIBSAKTIESELSKAPET SILJESTAD, DAMPSKIBSAKIESELSKAPET INTERNATIONAL, SKIBSAKTIESELSKAPET MANDEVILLE, SKIBSAKTIESELSKAPET GOODWILL, doing business as KLAVENESS LINE—JOINT SERVICE; DAMPSKIBSAKTIESELSKAPET JEANETTE SKINNER, SKIBSAKTIESELSKAPET PACIFIC, SKIBSAKTIESELSKAPET MARIE BAKKE, DAMPSKIBSAKTIESELSKAPET GOLDEN GATE, DAMPSKIBSAKTIESELSKAPET LISBETH, SKIBSAKTIESELSKAPET OGEKA, HVALFANGSTAKTIESELSKAPET SUDEROY, doing business as KNUTSEN LINE—JOINT SERVICE; SKIPSAKTIESEL-

SKAPET NORDHEIM, SKIPSAKTIESELSKAPET VITO, SKIPSAKTIESELSKAPET KIRKOY, SKIPSAKTIESELSKAPET SKAGEREK (DITLEY-SIMONSEN LINES), TRANSATLANTIC STEAMSHIP COMPANY, LTD., OF GOTBENBURG, doing business as PACIFIC ORIENT EXPRESS LINE—JOINT SERVICE; AMERICAN MAIL LINE, LTD.; MITSUBISHI SHIPPING CO., LTD., NIPPON KISEN KAISHA, LTD. (sometimes doing business as and known as NISSAN PACIFIC LINE); NITTO SHOSEN CO., LTD.; PACIFIC FAR EAST LINE, INC.; PACIFIC TRANSPORT LINES, INC.; STATES STEAMSHIP COMPANY; TRANSOCEAN TRANSPORT CORP. (sometimes doing business as MAGSAYSAY LINES); CANADIAN PACIFIC RAILWAY COMPANY; THE EAST ASIATIC COMPANY, LTD.; COMPAGNIE MARITIME DES CHARGEURS REUNIS; ORIENT STEAM NAVIGATION CO., LTD.; P & O—ORIENT LINES; ELLERMAN LINES, LIMITED, ELLERMAN & BUCKNALL STEAMSHIP CO. LIMITED, THE CITY LINE, LIMITED, HALL LINE, doing business as ELLERMAN & BUCKNALL ASSOCIATED LINES—JOINT SERVICE; NISSAN KAISEN KAISHA, LTD., TOHO KAIUN KAISHA, LTD., IINO KAIUN KAISHA, LTD., MITSUBISHI KAIUN KAISHA, LTD., KOKUSAI KAIUN KAISHA, LTD., doing business as KOKUSAI LINE—JOINT SERVICE; THE BANK LINE; LYKES BROS. S. S. CO., INC.; MITSUBISHI KAIUN KAISHA, LTD.; ORIENT MID-EAST LINES; PRINCE LINE LTD.; UNITED STATES LINES COMPANY; THE DE LA RAMA STEAMSHIP CO., INC., THE SWEDISH EAST ASIA CO., LTD., THE OCEAN STEAMSHIP CO., LTD., THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD., NEDERLANDSCHI STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V., doing business as DE LA RAMA LINES—JOINT SERVICE; SKIBSAKTIESELSKAPET VARILD, SKIBSAKTIESELSKAPET MARINA, AKTIESELSKABET GLITTRE, DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD, SKIBSAKTIESELSKAPET SOLSTAD, SKIBSAK-
[fol. 8] TIESELSKAPET SILJESTAD, DAMPSKIBSAKTIESELSKABET INTERNATIONAL, SKIBSAKTIESELSKAPET MANDEVILLE, SKIBSAKTIESELSKAPET GOODWILL, AKTIESELSKABET STANDARD, FEARNLEY & EGERS BEFRAGTNINGSFORRETNING A/S, doing business as FERN-VILLE FAR EAST LINES—FEARNLEY & EGER and A. F. KLAVENESS & CO. A/S; SKIBSAK-

TIESELSKAPET IGADI, AKTIESELSKAPET IVARANS REDERI, A/S BESCO and A/S LISE, doing business as IVARAN LINES—FAR EAST SERVICE—JOINT SERVICE; DAMPSKIBSSELSKABET AF 1912, AKTIESELSKAB, AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG, doing business as A. P. MOLLER-MAERSK LINE—JOINT SERVICE; A/S DEN NORSKI AFRIKA-OG AUSTRALIELINIE, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, doing business as WILHELMSENS DAMPSKIBSAKTIESELSKAB; AMERICAN PRESIDENT LINES, LTD.; COMPAGNIE DE TRANSPORTS OCEANIQUES; DAIDO KAIUN KAISHA, LTD.; ISTHMIAN LINES, INC.; KAWASAKI KISEN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MARITIME COMPANY OF THE PHILIPPINES, INC.; MITSUI STEAMSHIP COMPANY, LTD.; NISSAN KAISEN KAISHA, LTD.; NIPPON YUSEN KAISHA (also known as N. Y. K. Line); OSAKA SHOSEN KAISHA, LTD.; PACIFIC TRANSPORT LINES, INC.; PHILIPPINE NATIONAL LINES; SHINNIHON STEAMSHIP CO., LTD.; STATES MARINE LINES, INC. (also known as GLOBAL BULK TRANSPORT CORPORATION); STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; UNITED PHILIPPINE LINES, INC.; WATERMAN STEAMSHIP CORPORATION and YAMASHITA KISEN KAISHA; and also W. C. GALLOWAY and JAMES A. DENNEAN, Defendants.

COMPLAINT—Filed December 5, 1962

Complaint for Damages and Other Relief on Account of Violation of the Antitrust Laws of the United States

Comes now Carnation Company, a corporation, and complaining of the defendants brings this civil action against defendants based upon defendants' violation of the antitrust laws of the United States and for treble the amount of [fol. 9] damages suffered by it by reason of defendants' violations of the antitrust laws of the United States, and in this behalf shows as follows:

1. This action is brought for treble damages and arises under the Act of Congress of July 2, 1890, c. 647, 27 Stat. 209 as amended (15 USC §§ 1-7, commonly known as the Sherman Antitrust Act), and the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended (15 USC §§ 12-27 commonly known as the Clayton Act). The jurisdiction of this Court is invoked under the provisions of said statutes and the laws of the United States in such cases made and provided.

2. This action is brought against the defendants above named and hereinafter identified. Statements herein in the present tense refer to, and are made as of, all times herein mentioned except when hereafter specific and particular times are stated.

3. Each of the defendants, except as hereinafter stated, maintains an office, transacts business, has an agent and/or is found within the above named District and Division.

4. The evaporated milk manufactured, sold and shipped by plaintiff, as hereinafter stated, regularly moves by common carrier by water from Pacific Coast ports of the United States to the Philippine Islands in commerce and trade with foreign nations. The defendants other than Pacific Westbound Conference, Far East Conference, Dennean and Galloway are herein sometimes referred to as the carrier defendants. The business of the carrier defendants is the business of providing transportation as carriers by water in commerce with foreign nations. The price fixing combination and conspiracy and the price fixing hereinafter averred was in respect of said business of said carrier defendants and operated directly in and on and restrained said business and on the transportation of evaporated milk manufactured, sold and shipped as aforesaid by plaintiff, and restrained commerce and trade with foreign nations.

[fol. 10] 5. Plaintiff, Carnation Company, is a Delaware corporation, licensed to do business and doing business in the State of California and in the above District and Division. It has its principal office in the State of California.

It is engaged in the business, among other things, of manufacturing and processing fluid milk into evaporated milk, packing said evaporated milk and selling and shipping it in trade and commerce with foreign nations. More particularly plaintiff so sells said evaporated milk to buyers in the Philippine Islands and so ships it from Pacific Coast ports of the United States to the Philippine Islands and to said buyers in the Philippine Islands by carriers by water and by carrier defendants who served said trade and who are members of the Pacific Westbound Conference. The evaporated milk shipped by plaintiff as hereinafter averred was so shipped and transported.

6. Defendants N. V. Stoomvaart Maatschappij "Nederland", Koninklijke Rotterdamsche Lloyd N. V., Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco and A/S Atlantica are corporations associated together in business and doing business under the name Java Pacific & Hoegh Lines—Joint Service. Defendants Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville and Skibsaktieselskapet Goodwill are corporations associated together in business and doing business under the name Klaveness Line—Joint Service. Defendants Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka and Hvalfangstaktieselskapet Suderoy are corporations associated together in business and doing business under the name Knutsen Line—Joint Service. Defendants Skipsaktieselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet [fol. 11] Skagerek (Ditley-Simonsen Lines) and Transatlantic Steamship Company, Ltd., of Gotbenburg are corporations associated together in business and doing business as Pacific Orient Express Line—Joint Service. Defendants American Mail Line, Ltd., Mitsubishi Shipping Co., Ltd.,

Nippon Kisen Kaisha, Ltd. (sometimes doing business as and known as Nissan Pacific Line), Nitto Shosen Co., Ltd., Pacific Far East Line, Inc., Pacific Transport Lines, Inc., States Steamship Company, Transocean Transport Corp. (sometimes doing business as Magsaysay Lines), Canadian Pacific Railway Company, The East Asiatic Company, Ltd., Compagnie Maritime des Chargeurs Reunis, Orient Steam Navigation Co., Ltd., and P. & O.—Orient Lines are corporations. In and after January 1953 said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Pacific Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

7. Defendants Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co. Limited, The City Line, Limited, and Hall Line, Limited, are corporations associated together in business and doing business as Ellerman & Bucknall Associated Lines—Joint Service. Defendants Nissan Kaisen Kaisha, Ltd., Toho Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Mitsubishi Kaiun Kaisha, Ltd., and Kokusai Kaiun Kaisha, Ltd., are corporations associated together in business and doing business as Kokusai Line—Joint Service. Defendants The Bank Line, Lykes Bros. S. S. Co., Inc., Mitsubishi Kaiun Kaisha, Ltd., Orient Mid-East Lines, Prince Line Ltd. and United States Lines Company are corporations. In and after January 1953 said defendants were carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East.

8. Defendants The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Company, Ltd., and Nederlandschi Stoomvaart Maatschappij [fol. 12] "Oceaan" N. V. are corporations associated together in business and doing business as De La Rama Lines —Joint Service. Defendants Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sang-

stad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S are corporations associated together in business and doing business as Fern-Ville Far East Lines—Fearnley & Eger and A. F. Klaveness & Co. A/S. Defendants Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco and A/S Lise are corporations associated together in business and doing business as Ivaran Lines—Far East Service—Joint Service. Defendants Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg are corporations associated together in business and doing business as A. P. Moller-Maersk Line—Joint Service. Defendants A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI are corporations associated together in business and doing business as Wilhelmsens Dampskibsaktieselskab. Defendants American President Lines, Ltd., Compagnie De Transports Oceaniques, Daido Kaiun Kaisha, Ltd., Isthmian Lines, Inc., Kawasaki Kisen Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Maritime Company of the Philippines, Inc., Mitsui Steamship Company, Ltd., Nissan Kaisen Kaisha, Ltd., Nippon Yusen Kaisha (also known as N. Y. K. Line), Osaka Shosen Kaisha, Ltd., Pacific Transport Lines, Inc., Philippine National Lines, Shinnihon Steamship Co., Ltd., States Marine Lines, Inc. (also known as Global Bulk Transport Corporation), States Marine Corporation, States Marine Corporation of Delaware, United Philippine Lines, Inc., Waterman Steamship Corporation and Yamashita Kisen Kaisha are corporations. In and after January 1953 [fol. 13] said defendants were common carriers by water in foreign commerce and as such provided transportation by water in such commerce from the Atlantic Coast, Gulf of Mexico and Pacific Coast ports of the United States to the Far East, and particularly Manila in the Philippine Islands, for various commodities including evaporated milk.

9. Before January 1953 common carriers by water in foreign commerce, providing water transportation as such from Pacific Coast ports of the United States and of Canada to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States and Canada to the Far East, associated themselves together in a conference and under and pursuant to the terms of a written agreement known as Pacific Westbound Conference Agreement No. 57 formed the defendant voluntary association and conference, known as the Pacific Westbound Conference (hereafter referred to as PWC), for the purpose of acting as a group to regulate said commerce and the transportation service of said trade and particularly for the purpose of fixing, by tariffs by and through said association and conference, the rates at which the members of said association and conference would serve said trade by transportation of commodities in said trade and commerce. PWC is a conference only of carriers serving said trade. In and by said Agreement No. 57 it was provided that PWC should fix said rates and issue a tariff thereof. Said agreement was filed for approval with, and was approved by, the United States Shipping Board agreeably to the provisions of section 15 of the Shipping Act, 1916 and thereafter remained approved and in full force and effect. Only carriers serving said trade from Pacific Coast ports of the United States and of Canada to the Far East are members of PWC. Thereafter the rates of the members of defendant PWC for transportation of commodities in said trade and commerce and from the Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands, included), including the rates applicable to [fol. 14] the transportation of evaporated milk, were fixed by PWC acting agreeably to and under said Agreement No. 57, except as hereinafter averred.

10. In and after January 1953 the carrier defendants named in paragraphs 6 and 8 were parties to said Agreement No. 57 and members of defendant PWC. None of the carrier defendants named in paragraph 6 above was or is a

member of defendant Far East Conference. In and after January 1953 defendant W. C. Galloway was Chairman of defendant PWC.

11. Since before January 1953 the members of defendant PWC were the only common carriers by water providing general cargo and regular berth service and transportation service on substantially regular routes and with regular sailings, from Pacific Coast ports of the United States to the Far East.

12. Since before January 1953 defendant PWC has maintained its headquarters and its office and has conducted its business at San Francisco, California. At no time was it a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is, among other things, that of investigating and accumulating data with respect to the business of transportation by water from Pacific Coast ports of the United States to the Far East, including rates to be charged for such service and of fixing rates for such service by its members.

13. Before January 1953 carriers by water providing transportation service from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East (including Manila in the Philippine Islands) and as such carriers serving the trade from said ports of the United States to the Far East, associated themselves together in a conference and formed the defendant voluntary association and conference known as Far East Conference (hereafter referred to as FEC) for the purpose, among other things, of fixing transportation rates for transportation in said trade by its members who served said trade. Only carriers serving said trade from the Atlantic Coast and Gulf of Mexico [fol. 15] ports of the United States to the Far East are members of said association and conference and FEC is a conference only of carriers serving said trade. In and after January 1953 the carrier defendants named in para-

graph 7 and 8 above were members of said association and conference, and none of the defendants named in paragraph 7 above was a member of defendant PWC. Defendant James A. Dennean is Chairman of defendant FEC.

14. At no time was defendant FEC a carrier or a common carrier or in the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with any common carrier by water. Its business was and is that, among other things, of acting for its members in connection with the fixing of rates for transportation of commodities, by carriers by water from Atlantic Coast and Gulf of Mexico ports of the United States to the Far East as herein stated and at no time was it lawfully authorized or empowered to fix any rates from Pacific Coast ports of the United States nor was it agreed that it should have any part in fixing said rates except as averred in paragraph 18 below.

15. The carrier defendants are sued herein individually and as members of the association or associations of which they were members as herein stated.

16. The business and trade in commodities from the Atlantic Coast and Gulf of Mexico ports of the United States to the Far East is naturally competitive with the business and trade in commodities from the Pacific Coast ports of the United States to the Far East and PWC and FEC are conferences of carriers serving said different trades that are naturally competitive and would in fact be competitive and the transportation services for said different trades would be competitive and is competitive except as restrained as herein stated.

17. In November 1952 defendants, who were members of PWC, and defendants, who were members of FEC, entered [fol. 16] into an agreement in writing, known as Agreement No. 8200, wherein and whereby it was provided that said defendant members of defendant PWC and of defendant FEC should meet and make rules for joint action by said defendants which should include "the provision of ma-

chinery for the change of any rates, rules and regulations", but wherein and whereby it was provided that defendant PWC retained the right of independent action in respect of rates and that if defendant PWC "should determine that conditions affecting its operations require" a "change in its tariffs" it might notify defendant FEC of such proposed change, specifying the change, and thereafter and after the expiration of a maximum time of 72 hours after such notice defendant PWC "may make such changes". In and by said Agreement No. 8200 it was further provided that said agreement should not apply to 12 named commodities when shipped in bulk, referred to as "excepted commodities". Evaporated milk was not specified as one of said "excepted commodities". Said Agreement No. 8200 was filed for approval by, and was approved by, the Federal Maritime Board.

18. The provisions of said Agreements No. 57 and No. 8200 notwithstanding and contrary thereto, in January 1953 defendants met at Santa Barbara, California, and then and there secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations and to act and to fix rates for transportation of commodities, by the defendant carriers who were members of defendant PWC, from Pacific Coast ports of the United States to the Far East, not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200, and thereafter, said Agreements No. 57 and No. 8200 being still in effect, met and secretly and unlawfully renewed and continued said association, combination, conspiracy and agreement, and so associated together and so combining, conspiring and agreeing, agreed as follows:

(a) That neither defendant PWC nor defendant FEC nor [fol. 17] any member of either of said Conferences should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests, and agreed to a written "Joint Memorandum of Decisions" wherein

and whereby it was provided "that unauthorized disclosure to shippers of information regarding rate changes and/or the position of an individual Conference or any Member thereof, regarding rate requests is contrary to the spirit of the Joint Agreement";

(b) That defendants (and not PWC alone agreeably to said Agreement No. 57) would fix and agree upon the rates for transportation of commodities by water by members of defendant PWC in said trade from Pacific Coast ports of the United States to the Far East (the Philippine Islands included) and that the rates so fixed and agreed upon should then be given out and to shippers by defendant PWC falsely pretending to act as such and under said Agreement No. 57 and should be adhered to and charged by defendants providing transportation by water from Pacific Coast ports of the United States to the Far East and the Philippine Islands;

(c) That defendant PWC, contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200, would make no change in any rate established by it or fixed as aforesaid and to be charged by its members for transportation of commodities by water from Pacific Coast ports of the United States to the Far East (Manila, Philippine Islands included), without the concurrence of defendant FEC, except a rate for a commodity included in a list established by defendants acting pursuant to said secret and unlawful association, combination, conspiracy and agreement and known as a "list of initiative items" in respect of which defendant PWC might establish rates without the concurrence of defendant FEC; and

(d) That certain specified commodities should be on the said list of initiative items.

19. The above referred to list of initiative items did not [fol. 18] include condensed and/or evaporated milk until "Item No. 1350—Milk, condensed and evaporated" was included in said list by joint action of defendants in May 1961, as hereinafter averred.

20. The said association, combination and conspiracy referred to in paragraph 18 above never submitted to the jurisdiction of the Federal Maritime Board or its successor the Federal Maritime Commission and was never a carrier or a common carrier, by water or otherwise, and never carried on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. There was never filed with said Board or Commission nor filed with said Board or Commission for approval, nor approved by it, said agreement averred in paragraph 18 above, or a true copy thereof, or any true or complete or any memorandum thereof.

21. Defendants, associated together and combining, conspiring and agreeing as hereinabove averred and while said Agreements No. 57 and No. 8200 were in effect, did the things they had combined, conspired and agreed to do and the things hereinafter averred to have been done by them and for that purpose and for the purpose of carrying out the association, combination, conspiracy and agreement referred to in paragraph 18 above agreed upon and fixed rates for transportation by water from Pacific Coast ports of the United States to the Far East, and in so acting and issuing rates for evaporated milk as hereinafter alleged, acted by and through defendant PWC at San Francisco, California.

22. In 1951 PWC, acting agreeably to said Agreement No. 57 fixed and established the rates to be charged by its members for transportation of evaporated milk by water from the Pacific Coast ports of the United States to the Philippine Islands. Said rates were adhered to and charged by the members of PWC except as hereinafter averred. Before May 1957 defendants, acting as alleged in paragraph 18 above, agreed that the rates for transportation by water by members of defendant PWC from Pacific [fol. 19] Coast ports of the United States to the Philippine Islands for evaporated milk should be increased by $2.50 per ton and that defendant PWC, pretending to act agree-

ably to the provisions of said Agreement No. 57, should state and circulate said increase as effective May 1, 1957.

23. Before May 1, 1957, and effective as of May 1, 1957, PWC did, in fact, so announce and circulate said increase in said rates, and over plaintiff's protest defendants put into effect and applied said increased rates. In so doing defendants falsely pretended that PWC was acting lawfully and agreeably to said Agreement No. 57. In truth and in fact, in so doing, defendants were acting agreeably and pursuant to said unlawful combination, conspiracy and agreement averred in paragraph 18 above and the said agreement of defendants averred in paragraph 22 above. Said increased rates were thereafter charged and collected from plaintiff by the members of PWC for transportation by water of evaporated milk from the Pacific Coast ports of the United States to the Philippine Islands, until said rates were reduced as hereinafter stated.

24. In November 1957, plaintiff, in order to help it in meeting European competition in the sale of evaporated milk in the Philippine Islands and upon that ground which was then stated to defendant PWC, requested of defendant PWC that it reduce said increased rates on evaporated milk by $2.50 per ton and reduce them to the rates established and in effect before May 1, 1957.

25. Acting upon said request of plaintiff and on February 19, 1958, defendant PWC determined that said request should be granted and that the said rates on evaporated milk should be reduced as requested subject, however, to the concurrence of defendant FEC and thereupon requested of defendant FEC that it concur in said reduction. Defendant FEC declined to concur in said reduction so requested by defendant PWC and defendant PWC thereupon, and agreeably to the association, combination, conspiracy and agreement hereinabove averred in paragraph 18, withdrew [fol. 20] its said request for concurrence and no reduction in said rates was made except as hereinafter stated.

26. Thereafter defendant PWC, by writing, advised plaintiff that plaintiff's said request for reduction of the rates on evaporated milk was refused and represented to plaintiff as follows: "The members of the Pacific Westbound Conference have given long and careful study to your request that the rate for canned milk be reduced by $2.50 per ton. * * * our member lines were initially disposed to grant a reduction in the rate * * * This position has, however, been again reviewed and the required majority of the lines are now of the view that a reduction in the ocean freight rate would not materially affect the competitive position of American versus European supplier. * * * This entire matter has nevertheless again been carefully reviewed and the members of this Conference have agreed that at this time no further downward adjustment can be made in the freight rate applicable to canned, condensed and evaporated milk in the United States to Orient trade." Said statement and representation was false, and was then known to defendant PWC to be false, and defendant PWC then knew, and it was the fact, that plaintiff's said request for reduction of rates, as aforesaid, was declined by reason of the refusal of defendant FEC to concur in the said reduction. Said statement and representation was made agreeably to the association, combination, conspiracy and agreement averred in paragraph 18, and to that part thereof that "information regarding rate changes and/or the position of an individual Conference or any Member thereof regarding rate requests" not be disclosed to shippers.

27. Plaintiff had no knowledge of said secret association, combination, conspiracy or agreement or of the reason for said increase in the said rates on evaporated milk or of the true reason why its request for reduction of the said rates was declined, or of any facts which might have led to the discovery of those facts until it first became aware of the facts in May 1961 through disclosure made in May 1961 in the course of a proceeding being conducted by the [fol. 21] Federal Maritime Board and its successor and could not have discovered the same earlier by reason of the

agreement of defendants that the said facts be kept secret and by reason of the fact that defendants did in fact keep them secret from shippers as they had agreed to do, and theretofore plaintiff had in fact relied upon the representations made to it by defendant PWC.

28. The said rates on evaporated milk fixed and increased as aforesaid were kept in force and effect until May 7, 1962. In May 1961, defendants agreed that condensed and evaporated milk be included on the list of initiative items hereinabove referred to, and thereupon condensed and evaporated milk were so included as "Item No. 1350 Milk, Condensed and Evaporated". Thereafter effective on May 7, 1962 defendant PWC reduced the rates on evaporated milk for transportation by water from the Pacific Coast ports of the United States to the Philippine Islands by $2.50 per ton and to the rates which had applied prior to May 1, 1957 and after May 7, 1962 the said reduced rates were charged and collected for said transportation.

29. From before May 1, 1957, plaintiff sold to buyers in the Philippine Islands and shipped to Manila in the Philippine Islands from Pacific Coast ports of the United States evaporated milk and did so by defendant carriers who were members of defendant PWC. Plaintiff was forced to so ship by said defendant carriers by reason of the fact that said defendant carriers were the only carriers providing the type of transportation herein alleged to have been provided by them and were the only carriers by whom plaintiff, in the course of its said business, could ship to the Philippine Islands. For said shipments plaintiff was charged, and was forced to and did pay, the rates for transportation of evaporated milk fixed and made effective as hereinabove alleged. Plaintiff did not increase the price at which it sold its said evaporated milk in the Philippine Islands by reason of the said increased ocean freight rates which it was required to and did pay.

[fol. 22] 30. By reason of the premises and as a result of the aforesaid unlawful association, combination, conspiracy

and agreement in violation of the antitrust laws of the United States and the aforeaverred violations by the defendants of the antitrust laws of the United States and the aforesaid exacting from plaintiff the aforesaid increase in rates on evaporated milk plaintiff has been injured in its business and property in the amount of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70). It has been necessary for plaintiff to employ, and it has employed, attorneys to bring and prosecute this action under the antitrust laws of the United States.

Wherefore plaintiff prays:

1. That the association, combination, conspiracy and agreement of defendants, and their conduct and acts in pursuance thereof be decreed violations of the antitrust laws of the United States; and

2. That plaintiff do have and recover from defendants its damages in the sum of Three Hundred Forty-three Thousand Two Hundred Seventy-six and 70/100 Dollars ($343,276.70) trebled to One Million Twenty-nine Thousand Eight Hundred Thirty and 10/100 Dollars ($1,029,830.10) agreeably to the antitrust laws of the United States; plus

3. Plaintiff's cost of suit, including a reasonable attorney's fee; and have

4. Such other, further and different relief as, the premises considered, is proper.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Dunne & Phelps, By Arthur B. Dunne, Attorneys for Plaintiff, Carnation Company.

[fol. 23] [File endorsement omitted]

Edward D. Ransom, William H. King, Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco 4, California, GArfield 1-4600,

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Of Counsel, 120 Broadway, New York 5, New York,

Attorneys for Defendants, Members and former Members of the Far East Conference.

In the United States District Court

For the Northern District of California

Southern Division

Civil No. 41153

Carnation Company, a corporation, Plaintiff,

vs.

Pacific Westbound Conference, an unincorporated association, Far East Conference, an unincorporated association, et al., Defendants.

Motion to Dismiss—Filed March 1, 1963

The defendants, members and former members of the Far East Conference who raise no question regarding the validity of the service of process upon them, and who are named in the schedule annexed hereto, move the Court to dismiss the action on the grounds:

(1) That the complaint herein fails to state a claim upon which relief can be granted, in that the complaint charges that the acts therein alleged constitute violations of the antitrust laws, whereas the acts alleged in

the complaint constitute charges of violations of the [fol. 24] provisions of the Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supersedes the antitrust laws mentioned and referred to in the complaint and the remedy for said acts and charges is that afforded by the Shipping Act, 1916, as amended; and

(2) That this Court is without jurisdiction of the subject matter

(a) in that agreements between common carriers by water and conferences of common carriers by water in foreign commerce in respect of competition and co-operative arrangements and the practices adopted by such carriers in connection with rates established by them pursuant to such agreement between common carriers by water and/or conferences of such carriers in the foreign commerce are within the exclusive jurisdiction of the Federal Maritime Commission under the Shipping Act, 1916, as amended; and

(b) in that the alleged acts of the defendants set forth in the complaint are alleged to have occurred in respect of matters subject to the jurisdiction, supervision and regulation of the Federal Maritime Commission, which is authorized by the Shipping Act, 1916, as amended, to afford complete remedy by means of investigation, decision and appropriate order; and

(3) That there is pending a quasi-judicial proceeding before the Federal Maritime Commission in which the plaintiff herein has intervened, adduced evidence, cross-[fol. 25] examined witnesses, and submitted briefs, and in which substantially the same issues tendered by the complaint herein will be decided by the governmental agency having primary jurisdiction of the subject matter, whose decision will be subject to judicial review in an appropriate United States Court of Appeals.

The motion is based upon the attached Memorandum in Support and upon all of the pleadings herein.

Dated: This 28th day of February, 1963.

Lillick, Geary, Wheat, Adams & Charles, Edward D. Ransom.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Of Counsel, 120 Broadway, New York 5, N. Y.

[fol. 26]

ATTACHMENT TO MOTION

DEFENDANTS ON WHOSE BEHALF THIS MOTION IS MADE

Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co., Limited, The City Line, Limited and Hall Line, Limited, doing business as Ellerman & Bucknall Associated Lines—Joint Service; Lykes Bros. S. S. Co., Inc.; Mitsubishi Kaiun Kaisha, Ltd.; Orient Mid-East Lines; Prince Line, Ltd.; United States Lines Company; The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., the China Mutual Steam Navigation Company, Ltd. and Nederlandschi Stoomvaart Maatschappij "Oceaan" N.V. doing business as De La Rama Lines—Joint Service; Skibsaktieselskapet Varild, Skidsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S, doing business as Fern-Ville Far East Lines—Fearnley & Eger and A. F. Klaveness & Co., A/S; Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco, and A/S Lise, doing business as Ivaran Lines—Far East Service—Joint Service; Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg, doing business as A. P. Moller-Maersk Line—Joint

Service; A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, doing business as Wilhelmsens Dampskibsaktieselskab; American President Lines, Ltd.; Daido Kaiun Kaisha, Ltd.; Isthmian Lines, Inc.; Kawasaki Kisen Kaisha, Ltd.; Iino Kaiun Kaisha, Ltd.; Maritime Company of Philippines, Inc.; Mitsui Steamship Company, Ltd.; Nissan Kaisen Kaisha, Ltd.; Nippon Yusen Kaisha (also known as N.Y.K. Line); Osaka Shosen Kaisha, Ltd.; Pacific Transport Lines, Inc.; Philippine National Lines; Shinnihon Steamship Co., Ltd.; States Marine Lines, Inc. [fol. 27] (also known as Global Bulk Transport Corporation); States Marine Corporation; States Marine Corporation of Delaware; United Philippine Lines, Inc.; Waterman Steamship Corporation; Yamashita Kisen Kaisha; and The Far East Conference.

NOTICE OF MOTION TO DISMISS PROCEEDINGS

Please Take Notice that the undersigned will bring the above motion on for hearing before the Law and Motion Department of the above-entitled Court on the 11th day of March, 1963, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated at San Francisco, California, the 1st day of March, 1963.

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, Herman Goldman, Elkan Turk, Jr., Of Counsel, Attorneys for Defendant Far East Conference, et al.

[fol. 28] [File endorsement omitted]

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco 4, California, GArfield 1-4600, Attorneys for Defendants as Named Below.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

MOTION TO DISMISS—Filed March 1, 1963

Defendants named below pursuant to the Rules of Civil Practice of this Honorable Court and the Federal Rules of Civil Procedure move this Court to dismiss the complaint herein on the ground that the Shipping Act, 1916, as amended, 46 U.S.C., Sections 801-840, provides the exclusive remedy for each and every wrong alleged by said complaint and that, as a consequence, this Court is without jurisdiction to proceed as the matter is subject to the exclusive primary jurisdiction of the Federal Maritime Commission.

The motion is based upon the attached Memorandum in Support and upon all of the pleadings herein.

The defendants on whose behalf this motion is brought are: Pacific Westbound Conference, W. C. Galloway and the following carriers individually and as members of the [fol. 29] Pacific Westbound Conference: N.V. Stoomvaart

Maatschappij "Nederland," Koninklijke Rotterdamsche Lloyd N.V., Skibsaktieselskapet Arizona, Skibsaktieselskapet Astrea, Skibsaktieselskapet Aruba, Skibsaktieselskapet Noruega, Skibsaktieselskapet Abaco and A/S Atlantica doing business under the name Java Pacific & Hoegh Lines—Joint Service; Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselskapet Mandeville and Skibsaktieselskapet Goodwill doing business under the name of Klaveness Line—Joint Service; Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka and Hvalfangstaktieselskapet Suderoy doing business under the name Knutsen Line—Joint Service; Skipsaktieselskapet Nordheim, Skipsaktieselskapet Vito, Skipsaktieselskapet Kirkoy, Skipsaktieselskapet Skagerek (Ditley-Simonsen Lines) and Transatlantic Steamship Company, Ltd. of Gothenburg doing business as Pacific Orient Express Line—Joint Service; American Mail Line, Ltd.; Mitsubishi Shipping Co., Ltd.; Nippon Kisen Kaisha, Ltd. (sometimes doing business as and known as Nissan Pacific Line); Nitto Shosen Co., Ltd., Pacific Far East Line, Inc.; Pacific Transport Lines, Inc.; States Steamship Company; Transocean Transport Corp. (sometimes doing business as Magsaysay Lines); Orient Steam Navigation Co., Ltd.; P&O—Orient Lines; The De La Rama Steamship Co., Inc., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Company, Ltd., and Nederlandschi Stoomvaart Maatschappij "Oceaan" N.V. doing business as De La Rama Lines—Joint Service; Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskapet Glittre, Dampskibsinteressentskabet Garoone, Skibsaktieselskapet Sangstad, Skibsaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskapet International, Skibsaktieselskapet [fol. 30] Mandeville, Skibsaktieselskapet Goodwill, Aktieselskabet Standard and Fearnley & Egers Befragtningsforretning A/S doing business as Fern-Ville Far East Lines

—Fearnley & Eger and A. F. Klaveness & Co. A/S; Skibsaktieselskapet Igadi, Aktieselskapet Ivarans Rederi, A/S Besco and A/S Lise doing business as Ivaran Lines—Far East Service—Joint Service; Dampskibsselskabet Af 1912, Aktieselskab and Aktieselskapet Dampskibsselskabet Svendborg doing business as A. P. Moller-Maersk Line—Joint Service; A/S Den Norski Afrika-Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V and A/S Tankfart VI doing business as Wilhelmsens Dampskibsaktieselskab; American President Lines, Ltd.; Daido Kaiun Kaisha, Ltd.; Isthmian Lines, Inc.; Kawasaki Kisen Kaisha, Ltd.; Iino Kaiun Kaisha, Ltd.; Maritime Company of the Philippines, Inc.; Mitsui Steamship Company, Ltd.; Nissan Kaisen Kaisha, Ltd.; Nippon Yusen Kaisha (also known as N.Y.K. Line); Osaka Shosen Kaisha, Ltd.; Pacific Transport Lines, Inc.; Philippine National Lines; Shinnihon Steamship Co., Ltd.; States Marine Lines, Inc. (also known as Global Bulk Transport Corporation); States Marine Corporation; States Marine Corporation of Delaware; United Philippine Lines, Inc.; Waterman Steamship Corporation and Yamashita Kisen Kaisha.

Dated: This 1st day of March, 1963.

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, Attorneys for Defendants, Pacific Westbound Conference, et al.

NOTICE OF MOTION TO DISMISS PROCEEDINGS

Please Take Notice that the undersigned will bring the above motion on for hearing before the Law and Motion Department of the above entitled Court on the 11th day [fol. 31] of March, 1963, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated at San Francisco, California, the 1st day of March, 1963.

Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, Attorneys for Defendants, Pacific Westbound Conference, et al.

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, et al., Defendants.

MOTION TO INTERVENE AS DEFENDANT—Filed March 1, 1963

The Federal Maritime Commission moves this honorable Court for leave to intervene herein pursuant to Rule 24 of the Federal Rules of Civil Procedure as a defendant in this proceeding for the purpose of moving this Court to dismiss the complaint herein on the grounds stated in the motion to dismiss submitted herewith.

The grounds of this motion are set forth in the attached memorandum.

Dated this 1st day of March, 1963.

James L. Pimper, General Counsel, Robert E. Mitchell, Deputy General Counsel, Robert B. Hood, Jr., Attorney Federal Maritime Commission, By Robert B. Hood, Jr., Attorneys for Defendant-Intervener, Federal Maritime Commission.

[fol. 33]

NOTICE OF MOTION

To:

Arthur B. Dunne, Esq., Attorney for Plaintiff, Dunne, Dunne & Phelps, 333 Montgomery Street, San Francisco 4, California.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room , United States Court House, Seventh and Mission Streets, San Francisco, California on the 11th day of March, 1963, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: Robert B. Hood, Jr., Attorney for Defendant-Intervener, Federal Maritime Commission, Washington 25, D. C.

[fol. 34] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION, Defendant-Intervener.

MOTION TO DISMISS—Filed March 1, 1963

The Federal Maritime Commission, defendant-intervener, moves this Court to dismiss the complaint herein on the

ground that the Shipping Act, 1916, (46 U.S.C. 801 et seq.) provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter.

The arguments and authorities in support of this motion are set forth in the attached memorandum.

Dated this 1st day of March, 1963.

James L. Pimper, General Counsel, Robert E. Mitchell, Deputy General Counsel, Robert B. Hood, Jr., Attorney, Federal Maritime Commission, By Robert B. Hood, Jr., Attorneys for Defendant-Intervener, Federal Maritime Commission.

[fol. 35]

NOTICE OF MOTION

To:

Arthur B. Dunne, Esq., Attorney for Plaintiff, Dunne, Dunne & Phelps, 333 Montgomery Street, San Francisco 4, California.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room , United States Court House, Seventh and Mission Streets, San Francisco, California on the 11th day of March, 1963, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: Robert B. Hood, Jr., Attorney for Defendant-Intervener, Federal Maritime Commission, Washington 25, D. C.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION,
Defendant-Intervener.

INTERVENER'S ANSWER—Lodged March 1, 1963 and Filed April 30, 1963

The Federal Maritime Commission, defendant intervener, has pending before it an evidentiary investigatory proceeding entitled Docket 872, which involves substantially the same issues and defendants as in the complaint on file in this court. For defendant intervener either to admit or to deny the factual allegations of the complaint might be construed as, in effect, pre-judging its own proceeding. Defendant intervener's sole purpose in participating in this proceeding is to move the court to dismiss the complaint because the exclusive primary jurisdiction of the matters alleged in the complaint are in the Federal Maritime Commission.

[fol. 37] To the extent that the rules of pleading require an assumption of the admission or denial of the allega-

tions of the complaint for purposes of a motion to dismiss on jurisdictional grounds, such assumption is made.

Dated this day of February, 1963.

James L. Pimper, General Counsel, Robert E. Mitchell, Deputy General Counsel, Robert B. Hood, Jr., Attorney, Federal Maritime Commission, By Robert B. Hood, Jr., Attorneys for Defendant-Intervener, Federal Maritime Commission.

[fol. 38]

AFFIDAVIT OF THOMAS LISI, SECRETARY, FEDERAL MARITIME COMMISSION

District of Columbia ss.

Thomas Lisi, being first duly sworn, deposes and says:

1. I am the Secretary of the Federal Maritime Commission and as such am acquainted with the files and records of the Federal Maritime Commission and proceedings brought before that Commission. By order of October 26, 1959 of the Federal Maritime Board, predecessor agency to the Federal Maritime Commission, an investigatory proceeding was instituted to ascertain whether FMB Agreement No. 8200 between the member lines of the Far East Conference and the members lines of the Pacific Westbound Conference should continue to be approved, whether the parties have entered into agreements outside Agreement 8200, whether there has been a violation of Sections 15, 16, or 17 of the Shipping Act, 1916, and other matters as set forth in the order. A true copy of the order instituting such investigation, which proceeding is designated Docket No. 872, is attached to this Affidavit as Exhibit 1.

2. The Carnation Company petitioned the Federal Maritime Board to intervene in Docket 872. A ruling authorizing such intervention was issued. Thereafter Carnation Company participated in the proceeding. A true copy of the Petition to Intervene and the ruling authorizing such intervention are attached as Exhibits 2 and 3.

3. On adoption of Reorganization Plan No. 7 of 1961 (which became effective August 12, 1961) by which the Federal Maritime Board was abolished and the Federal Maritime Commission created, the Federal Maritime Com-[fol. 39] mission on August 12, 1961 by General Order No. 1 took over and continued all proceedings of the Federal Maritime Board, including the proceeding in Docket 872.

4. The current status of Docket 872 is that extensive hearings before Chief Examiner Basham in various places in the United States have been held, briefs by the parties, including the Carnation Company have been filed, and the matter has been submitted for decision by the Examiner, following which it will be considered by the Commission.

5. A true copy of a portion of Carnation Company's brief in Docket 872 is attached hereto as Exhibit 4.

6. A true copy of Agreement 8200 between the member lines of the Pacific Westbound Conference and the Far East Conference is attached marked Exhibit 5.

Thomas Lisi

Subscribed and sworn to before me this 21st day of February, 1963.

Ruth May Burroughs, Notary Public in and for the District of Columbia. My Commission Expires May 31, 1967.

[Seal]

[fol. 40]

EXHIBIT 1 TO AFFIDAVIT

(S E R V E D)
(OCTOBER 26, 1959)
(Federal Maritime Board)

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its Office in Washington, D. C., this 26th day of October 1959.

DOCKET NO. 872

AGREEMENT NO. 8200—JOINT AGREEMENT BETWEEN THE MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

IT APPEARING, that the member lines of the Far East Conference and Pacific Westbound Conference are parties to a certain Agreement No. FMB 8200 approved by the Federal Maritime Board pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and pursuant to that agreement act jointly for the purpose of establishing the rates and rules and regulations relating to the transportation by them of commodities exported from the United States to Far East destinations, and

IT FURTHER APPEARING, that protests against said agreement have been received from shippers and other persons, and

IT FURTHER APPEARING, that the public interest requires an investigation and hearing by this Board for the purpose of determining whether said Agreement No. 8200 should be (1) granted continued approval, (2) modified, or (3) disapproved,

NOW THEREFORE, pursuant to sections 15, 16, 17, and 22 of the Shipping Act, 1916, as amended (46 U.S.C. 814, 815, 816 and 821),

IT IS ORDERED, that the Board, upon its own motion, enter upon an investigation and hearing to determine whether said Agreement No. 8200 is a true and complete [fol. 41] agreement of the parties within the meaning of said section 15 and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair between carriers, shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act, 1916, as amended,

IT IS FURTHER ORDERED, that the member lines of the Far East Conference and Pacific Westbound Conference be, and they are hereby, made respondents in this proceeding, and

IT IS FURTHER ORDERED, that this order be published in the Federal Register and that a copy of such order be served upon all respondents herein, and

IT IS FURTHER ORDERED, that this proceeding be set for hearing before an examiner of the Board's Hearing Examiners Office at a place and date to be fixed by the Chief Examiner.

By the Board.

S/ James L. Pimper
Secretary

(SEAL)

USCOMM-MA-DC

[fol. 42]

EXHIBIT 2 TO AFFIDAVIT

[Stamp—Received—Aug 22 3:33 PM '60—Hearing Examiners' Office—Federal Maritime Board—Acknowledged .....]

[Stamp—Served—Sep 3 1960—Federal Maritime Board]

BEFORE THE
FEDERAL MARITIME BOARD

PETITION OF CARNATION COMPANY
TO INTERVENE

Docket No. 872

AGREEMENT NO. 8200—JOINT AGREEMENT
BETWEEN THE MEMBER LINES OF THE
FAR EAST CONFERENCE AND THE
MEMBER LINES OF THE PACIFIC
WESTBOUND CONFERENCE

Your petitioner, CARNATION COMPANY, respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That petitioner is now and at all times herein mentioned has been a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office in the City of Los Angeles, State of California, whose principal business is manufacturing and processing of various food products, including animal and poultry feeds, the said product of petitioner being sold throughout the United States and elsewhere.

[fol. 43] II. That petitioner has for many years past shipped and expects to continue shipping its products from the Pacific Coast range of ports to the Phillipine Islands and other destinations, subject to the rates, rules and regulations as found in tariffs issued by member lines of the Pacific Westbound Conference.

III. That petitioner has reasonable grounds to believe that the said rates, rules and regulations, as hereinabove referred to in Section II have been the subject of and resulted from negotiations between the member lines of the Far East Conference and member lines of the Pacific Westbound Conference to the detriment of petitioner and shippers in a position similar to that of petitioner with respect to shipping similar products to the Far East.

IV. That petitioner can, if allowed to become a party to this proceeding, without unduly broadening the issues therein, take proper steps to safeguard petitioners future shipments to the Far East which undoubtedly will continue to be transported ad litem and after termination of the instant proceeding.

WHEREFORE, said petitioner, CARNATION COMPANY, respectfully requests leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Los Angeles, California, this 16th day of August, 1960.

H. E. Olson (Signed)
H. E. Olson, Vice President
Carnation Company
5045 Wilshire Boulevard
Los Angeles 36, California

C. S. Connolly (Signed)
C. S. Connolly, Attorney
For Petitioner

Communications in regard to this Petition should be addressed to:

C. S. Connolly, Esq.
5045 Wilshire Blvd.
Los Angeles 36, California

[fol. 44]

VERIFICATION

STATE OF CALIFORNIA)
) SS.:
CITY AND COUNTY OF LOS ANGELES)

H. E. Olson, being first duly sworn on oath deposes and says that he is Vice President of CARNATION COMPANY, a Corporation, and is the person who signed the foregoing petition; that he has read the petition and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

H. E. OLSON (Signed)
H. E. Olson

Subscribed and sworn to before me, a notary public in and for the State of California, City and County of Los Angeles, this 16th day of August, A. D. 1960.

HARRY A. ROGAHN (Signed)
H. A. Rogahn, Notary Public

My Commission expires January 28th, 1961.

(SEAL)

[fol. 45]

EXHIBIT 3 TO AFFIDAVIT

(S E R V E D
(SEPTEMBER 8, 1960
(Federal Maritime Board

FEDERAL MARITIME BOARD

WASHINGTON 25, D. C.

September 8, 1960

No. 872

AGREEMENT NO. 8200—JOINT AGREEMENT BETWEEN THE MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

RULING ON PETITIONS TO INTERVENE

Petitions to intervene herein having been filed by Th Northern California Ports and Terminals Bureau, Inc., an Carnation Company, and good cause appearing, said pet tions are hereby granted.

Interveners are reminded that documents filed in this pr ceeding such as motions, petitions, etc., must be serve upon all parties of record, a list of whom are on file in th Board's Office of Hearing Examiners, Washington, D. C.

/s/ G. O. BASHAM
G. O. Basham
Presiding Examiner

USCOMM-MA-DC

[fol. 46]

EXHIBIT 4 TO AFFIDAVIT

Extract From Page 8 of Brief Dated October 5, 1962, Filed by Carnation Company in Federal Maritime Commission Docket No. 872.

"As far as Carnation Company is concerned, it has never had any say as to whether or not the rates on evaporated milk should be granted local initiative or not. As a matter of fact, our source of knowledge on the existence and operation of local initiative arrangements comes only as a result of the Commission's institution of the present investigation. Here is an action by the Respondents which goes to the very heart of rate making, and without doubt had this rate making procedure been known to Carnation Company, a complaint would have been filed with the Commission against this unfair, unjust and discriminatory conference activity. Here is a rate procedure which has had tremendous affect upon Carnation Company efforts to meet European competition in the Philippine Islands and we have had no notice of such procedure operating within the conference."

[fol. 47]

EXHIBIT 5 TO AFFIDAVIT

Copy of
Federal Maritime Board
Agreement No. 8200
Approved 12/29/52

Far East Conference

and

Pacific Westbound Conference

AGREEMENT made in the City of New York this fifth day of November, 1952, by and between the parties who shall execute this AGREEMENT at the foot hereof under

the caption "Members of the Pacific Westbound Conference", who are hereinafter sometimes collectively referred to as the PACIFIC LINES, and the parties who shall execute this AGREEMENT at the foot hereof under the caption "Members of the Far East Conference", who are hereinafter sometimes collectively referred to as the ATLANTIC/GULF LINES.

WITNESSETH:

1. The PACIFIC LINES are parties to an agreement which has been designated Federal Maritime Board Agreement No. 57, as amended, which designates the parties thereto as the Pacific Westbound Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the PACIFIC LINES, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 57, as amended.

2. The ATLANTIC/GULF LINES are parties to an agreement which has been designated Federal Maritime Board Agreement No. 17, as amended, which designates the parties thereto as the Far East Conference; and whenever reference is hereinafter made to action which is required or permitted to be taken by the ATLANTIC/GULF LINES, such reference is intended to refer to action such as is required to effect the establishment or change of rates pursuant to said Agreement No. 17, as amended.

3. The PACIFIC LINES operate vessels as common carriers of cargo from Pacific Coast ports of the United States and Pacific Coast ports of Canada to certain ports in the Far East; and the ATLANTIC/GULF LINES operate vessels as common carriers of cargo from United States Atlantic and Gulf ports to some of the same ports in the Far East; and action taken hereunder shall apply to transportation of cargoes to all destinations which shall, from time to time, be common to the scope of both Agreements 57 and 17.

[fol. 48] 4. The purpose which the parties desire to accomplish hereby (which is hereinafter sometimes for brevity referred to as "the purpose of this agreement") is to assure to the parties hereto, as well as to the manufacturers, merchants, farmers and labor, whose products are exported from the United States to Far East destinations which may, from time to time, be common to the scope of both said Agreements 57 and 17, stability of ocean rates and frequency, regularity and dependability of service which is essential to their continued prosperity; and for the accomplishment of the purpose of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates, except for the following commodities when shipped in bulk:

Coal	Barley
Coke	Rice
Phosphate Rock	Corn
Salt	Soyabeans
Ores	Oats
Wheat	Rye

which expected commodities are not included within the scope of this agreement.

NOW, THEREFORE, in consideration of the premises and of the mutual undertakings of the parties hereto, it is hereby agreed as follows:

FIRST: As promptly as possible after the approval of this agreement by the Federal Maritime Board, the parties shall hold a meeting which is hereinafter referred to as the "initial meeting." The initial meeting shall be held at a time and place to be mutually agreed upon by the parties hereto. If, however, prior to the 30th day after such approval the parties hereto shall not so have mutually agreed upon the time and place for the holding of the initial meeting, said initial meeting shall be held on the 40th day after such approval at the Fairmont Hotel in the City of San Francisco,

California; and if such 40th day shall fall on a Saturday, Sunday or legal holiday, said meeting shall be held on the second business day thereafter, at the same place. Such meeting shall be attended by representatives of the PACIFIC LINES and of the ATLANTIC/GULF LINES. All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES, acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates. The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting.

[fol. 49] *SECOND*: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or viola-

tion of this agreement. The parties shall, however, promptly give to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any changes in tariffs given or made as provided for in this Article SECOND.

THIRD: The parties hereto shall, promptly after the adjournment of the initial meeting and of each subsequent meeting, file with the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, a record of all business transacted at said respective meeting.

FOURTH: Neither the PACIFIC LINES nor the ATLANTIC/GULF LINES shall admit new parties to their Conference Agreement unless such parties shall simultaneously become parties to this agreement by affixing their signatures under the appropriate caption or captions at the foot of this agreement or a counterpart thereof. Whenever any party hereto shall have ceased to be a party to Agreement No. 57 as amended, or a party to Agreement No. 17 as amended, or a party to both of said agreements, as the case may be, such party by such cessation shall cease also to be a party to this agreement; but so long as such party shall continue to be a party to either said Agreement No. 57 as amended, or Agreement No. 17 as amended, it shall also continue to be a party to this agreement. Prompt notice of the change of parties hereto shall be given by each group to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended.

FIFTH: Any notice required or permitted hereby to be given shall be given by telegram if telegraphic communication be available, otherwise by air mail, and if given to the PACIFIC LINES shall be addressed to the Secretary-Manager of the Pacific Westbound Conference at San Francisco, California, and if given to the ATLANTIC/GULF LINES shall be addressed to the Chairman of the Far East Conference, 11 Broadway, New York 4, New York. The

deposit of any such notice air mail, postage prepaid, in a United States Post Office letter box, or the deposit of any such telegram in an office of any telegraphic company, as the case may be, shall constitute the giving of such notice. Each of the groups of lines may, from time to time, change the address to which notices to it are to be dispatched by notice given to the other group.

[fol. 50] *SIXTH*: This agreement shall become effective when, but not until, the same shall have been approved by the Federal Maritime Board, pursuant to the provisions of Section 15, Shipping Act, 1916, as amended.

SEVENTH: Each Line, a party hereto, shall bear the expenses of its own representatives while attending any meetings held under the provisions hereof. The expenses of hiring the places where the meetings shall be held and such expenses incidental thereto as may be for the joint benefit of all of the parties hereto, shall be borne to the extent of one half thereof by the PACIFIC LINES as a group and one half thereof by the ATLANTIC/GULF LINES as a group.

EIGHTH: This agreement shall continue in effect for a period of nine months and shall continue thereafter until the ninetieth day after any one or more of the Lines, a party or parties hereto, shall have given to the PACIFIC LINES and to the ATLANTIC/GULF LINES and to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, notice of termination; and on said ninetieth day this agreement shall terminate and come to an end.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective officers or representatives and duly authorized as of the day and year hereinabove first written.

[fol. 51]

MEMBERS of the
PACIFIC WESTBOUND CONFERENCE

AMERICAN-HAWAIIAN STEAMSHIP COMPANY
By: (signed): J. A. STUMPF
J. A. Stumpf
Title: Assistant Vice President

AMERICAN MAIL LINE
By: (signed): A. R. LINTNER
A. R. Lintner
Title: President

AMERICAN PRESIDENT LINES, LTD.
By: (signed): W. K. VARCOE
W. K. Varcoe
Title: Vice President

CANADIAN PACIFIC RAILWAY COMPANY
By: (signed): K. M. FETTERLY
K. M. Fetterly
Title: Foreign Freight Traffic Manager

DE LA RAMA LINES—Joint Service
The De La Rama Steamship Co., Inc.
The Swedish East Asia Co., Ltd.
The Ocean Steamship Co., Ltd.
The China Mutual Steam Navigation Company, Ltd.
Nederlandsche Stoomvaart Maatschappij "Oceaan" N.V.
(Funch, Edye & Company, Inc., General Agents.)
By: (signed): V. H. ARNESEN
V. H. Arnesen
Title: Vice President

THE EAST ASIATIC COMPANY, LTD.
By: (signed): GEORGE J. GMELCH
George J. Gmelch
Title: Freight Traffic Manager

ISTHMIAN STEAMSHIP COMPANY
By: (signed): JAMES J. McCABE
James J. McCabe
Title: Vice President—Traffic

JAVA PACIFIC & HOEGH LINES—Joint Service
N.V. Stoomvaart Maatschappij
"Nederland"
Koninklijke Rotterdamsche Lloyd, N.V.
Skibsaktieselskapet Arizona
Skibsaktieselskapet Astrea
Skibsaktieselskapet Aruba
Skibsaktieselskapet Noruega
Skibsaktieselskapet Abaco
A/S Atlantica
(Trans-Pacific Transportation
Company, Pacific Coast General
Agents.)
By: (signed): E. L. BARGONES
E. L. Bargones
Title: Vice President

[fol. 52]

MEMBERS of the
PACIFIC WESTBOUND CONFERENCE (continued)

KLAVENESS LINE—Joint Service
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
(A. F. Klaveness & Co., A/S)
By: (signed): C. L. BLOM
C. L. Blom
Title: Director

KNUTSEN LINE—Joint Service
Dampskibsaktieselskapet Jeanette
Skinner
Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden Gate
Dampskibsaktieselskapet Lisbeth
(Inter-Ocean Steamship Corporation,
Pacific Coast General Agents.)

By: (signed): HARRY BROWN
Harry Brown
Title: President

NIPPON YUSEN KAISHA (N.Y.K. LINE)
(James Griffiths & Sons, Inc., Agents)

By: (signed): WM. J. CLARK
Wm. J. Clark
Title: Vice President &
General Manager

PACIFIC FAR EAST LINES INC.

By: (signed): T. E. CUFFE
T. E. Cuffe
Title: President

PACIFIC ORIENT EXPRESS LINE—Joint Service
Skipsaktieselskapet Nordheim
Skipsaktieselskapet Vito
Skipsaktieselskapet Kirkoy
Skipsaktieselskapet Skagerak
(Ditley-Simonsen Lines)
Transatlantic Steamship Company, Ltd.,
of Gothenburg
(General Steamship Corporation, Ltd.,
Agents.)

By: (signed): M. FRAZIER
M. Frazier
Title: Assistant Vice President

PACIFIC TRANSPORT LINES, INC.
By: (signed):
GEORGE E. TALMAGE, JR.
George E. Talmage, Jr.
Title: Vice President-Traffic

STATES MARINE CORPORATION/STATES MARINE CORPORATION OF DELAWARE
By: (signed):
JOHN TILNEY CARPENTER
John Tilney Carpenter
Title: Vice President

STATES STEAMSHIP CO.
By: (signed): J. R. DANT
J. R. Dant
Title: Vice President

WATERMAN STEAMSHIP CORPORATION
By: (signed):
J. W. O. VON HERBULIS
J. W. O. Von Herbulis
Title: Vice President

[fol. 53]

MEMBERS of the FAR EAST CONFERENCE

AMERICAN-HAWAIIAN STEAMSHIP COMPANY
By: (signed): J. A. STUMPF
J. A. Stumpf
Title: Assistant Vice President

AMERICAN PRESIDENT LINES, LTD.
By: (signed): A. A. ALEXANDER
A. A. Alexander
Title: Vice President

THE BANK LINE, LTD.
(Boyd, Weir & Sewell, Inc., Agents)
By: (signed): J. J. CLARK
J. J. Clark
Title: Vice President

DAIDO KAIUN KAISHA LTD.
(A. L. Burbank & Company, Ltd.
General Agents, U. S. Atlantic
and Gulf Ports.)

By: (signed):
A. L. BURBANK, SR.
A. L. Burbank, Sr.
Title: Chairman

DE LA RAMA LINES—Joint Service
The De La Rama Steamship Co., Ltd.
The Swedish East Asia Co., Ltd.
The Ocean Steam Ship Company, Ltd.
The China Mutual Steam Navigation
Co., Ltd.
Nederlandsche Stoomvaart Maatschappij
"Oceaan" N.V.
(Funch, Edye & Co., Inc., Agents)

By: (signed): V. H. ARNESEN
V. H. Arnesen
Title: Vice President

ELLERMAN & BUCKNALL ASSOCIATED
LINES—Joint Service
Ellerman Lines, Limited
Ellerman & Bucknall Steamship Co.
Limited
The City Line, Limited
Hall Line, Limited
(Norton, Lilly & Company,
General Agents.)

By: (signed): S. S. NORTON
S. S. Norton
Title: Partner

FERN-VILLE FAR EAST LINES—
FEARNLEY & EGER and
A. F. KLAVENESS & CO. A/S—
Joint Service
Skibsaktieselskapet Varild
Skibsaktieselskapet Marina

Aktieselskabet Glittre
Dampskibsinteressentskabet Garonne
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
(Fearnley & Eger, Inc., Agents)

By: (signed): NILS O. SEIM
Nils O. Seim
Title: Vice President

[fol. 54]

MEMBERS of the FAR EAST CONFERENCE
(continued)

ISTHMIAN STEAMSHIP COMPANY

By: (signed): JAMES J. MCCABE
James J. McCabe
Title: Vice President—Traffic

IVARAN LINES—FAR EAST SERVICE—
Joint Service
Skibsaktieselskapet Igadi
Aktieselskabet Ivarans Rederi
A/S Besco A/S Lise
(Stockard & Company, Inc.,
General Agents.)

By: (signed): J. J. HOLLORAN
J. J. Holloran
Title: Vice President

KAWASAKI KISEN KAISHA, LTD.
(Kerr Steamship Company, Inc.,
As Agents.)

By: (signed): CORTLAND LINDER
Cortland Linder
Title: Vice President

KOKUSAI LINE—Joint Service
Nissan Kaisen Kaisha, Ltd.
Toho Kaiun Kaisha, Ltd.
Iino Kaiun Kaisha, Ltd.

Mitsubishi Kaiun Kaisha, Ltd.
Kokusai Kaiun Kaisha, Ltd.
(Kokusai Kaiun Kaisha, Ltd.,
Operator & General Agent.)
(States Marine Corporation of
Delaware, General Agent.)

By: (signed):
JOHN TILNEY CARPENTER
John Tilney Carpenter
Title: Vice President

*LANCASHIRE SHIPPING COMPANY, LTD.
(Castle Line)
(American-Hawaiian Steamship
Company, Agents.)

By: (signed): J. A. STUMPF
J. A. Stumpf
Title: Assistant Vice President

*As Lancashire Shipping Company, Ltd.'s resignation from Far East Conference Agreement No. 17, as amended, becomes effective on December 1, 1952, it is understood that in accordance with Article FOURTH they shall cease to be a party to this Joint Agreement as of that date, and notice of such cessation shall be given to the Federal Maritime Board.

LYKES BROS. STEAMSHIP CO., INC.

By: (signed): R. C. COLTON
R. C. Colton
Title: Assistant Secretary

MOLLER-MAERSK LINE—Joint Service
Dampskibsselskabet Af 1912
Aktieselskab
Aktieselskabet Dampskibsselskabet Svendborg

By: (signed): TH HOST
Th Host
Title: Attorney-in-Fact

[fol. 55]

MEMBERS of the FAR EAST CONFERENCE
(continued)

MITSUI STEAMSHIP CO., LTD.
(William J. Rountree Co., Inc.,
General Agents.)

By: (signed): LESTER WOLFE
Lester Wolfe
Title: President

NIPPON YUSEN KAISHA
(Boyd, Weir & Sewell, Inc., Agents.)

By: (signed): J. J. CLARK
J. J. Clark
Title: Vice President

OSAKA SHOSEN KAISHA, LTD.
(American-Hawaiian Steamship
Company, Agents.)

By: (signed): W. J. TRACY
W. J. Tracy
Title: General Manager

PRINCE LINE, LTD.
(Furness, Withy & Co., Ltd., Agents)

By: (signed): J. J. WALSH
J. J. Walsh
Title: Local Director

SHINNIHON STEAMSHIP COMPANY, LTD.
(Texas Transport & Terminal Co.,
Inc., Agents.)

By: (signed): MELVIN P. BILLUP
Melvin P. Billup
Title: Executive Vice Presiden

STATES MARINE CORPORATION/STATES
MARINE CORPORATION OF DELAWARE

By: (signed):
JOHN TILNEY CARPENTE
John Tilney Carpente
Title: Vice President

UNITED STATES LINES COMPANY
(American Pioneer Line)

By: (signed): P. E. McIntyre
P. E. McIntyre
Title: General Freight
Traffic Manager

WATERMAN STEAMSHIP CORPORATION

By: (signed):
J. W. O. Von Herbulia
J. W. O. Von Herbulia
Title: Vice President

WILHELMSENS DAMPSKIBSAKTIESELSKAB
A/S Den Norske Afrika-Og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
(Barber Steamship Lines, Inc.,
Agents.)

By: (signed): V. G. Barnett
V. G. Barnett
Title: President

[fol. 56]

MEMBERS of the FAR EAST CONFERENCE
(continued)

YAMASHITA KISEN KAISHA
(Norton, Lilly & Company,
General Agents.)

By: (signed): S. S. Norton
S. S. Norton
Title: Partner

USCOMM-MA-DC

[fol. 57] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action File No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al.; Defendants.

PLAINTIFF'S OBJECTION TO MOTION OF THE FEDERAL MARITIME COMMISSION FOR LEAVE TO INTERVENE AS DEFENDANT—Filed March 21, 1963

[fol. 58] Plaintiff, Carnation Company, a corporation, objects to the granting of the motion of the Federal Maritime Commission for leave to intervene herein as a defendant and for ground of objection shows as follows:

1. The Federal Maritime Commission has no interest in the subject matter of this action, or any part of the subject matter thereof or any other interest herein and does not present or suggest any matter of interest upon its part in any phase of this action.

2. The Federal Maritime Commission does not present, or seek to present, any claim or defense herein or any matter in aid of or connected with any matter of claim or defense herein and by its intervention does not seek to participate in the determination of any issue in this action but by its motion for leave to intervene and by its purported answer (tendered for filing, apparently, in attempted compliance with FRCP Rule 25 (c)) seeks to intervene not to

present any question of law or fact or any matter connected with any issue of law or fact in the action but solely for the purpose of moving to dismiss the action and the said answer sets forth no matter of claim or defense to this action.

3. In this action plaintiff does not rely for ground of claim upon any statute administered by the Federal Maritime Commission or any regulation, order, requirement or agreement issued or made pursuant to the Shipping Act of 1916 or any executive order and does not rely on any alleged nonapproval by the Federal Maritime Board or the Federal Maritime Commission as alleged in the complaint or otherwise and does not rely on any claim of violation of the Shipping Act of 1916 but relies in this action solely upon violation of the antitrust statutes of the United States and sets up the nonapproval, referred to in the complaint, only to show that there is no impediment to the claim made by plaintiff or to the operation of the antitrust statutes of the United States by reason of any provision of the Shipping Act of 1916.

[fol. 59] 4. The application for leave to intervene is not properly made and should not be granted under FRCP Rule 24 (b).

Respectfully submitted,

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, By Arthur B. Dunne, Attorneys for Plaintiff.

Authorities

Plaintiff will rely on the authorities in authority memorandum which plaintiff will file in opposition to the motions to dismiss.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, By Arthur B. Dunne, Attorneys for Plaintiff.

Receipt of a copy of the foregoing objections is acknowledged this day of March, 1963.

Edward D. Ransom, William H. King, Lillick, Geary, Wheat, Adams & Charles, By H. D. Harris, Jr., Attorneys for Defendants.

[fol. 60] Certificate of Service by Mail (omitted in printing).

[fol. 61] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Before: Hon. William T. Sweigert, Judge.

No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

TRANSCRIPT OF HEARING ON MOTION TO DISMISS AND MOTION OF FEDERAL MARITIME COMMISSION FOR LEAVE TO INTERVENE AS DEFENDANT—April 8, 1963

[fol. 62] APPEARANCES:

On behalf of the Plaintiff:

Messrs. Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, 315 Montgomery Street, San Francisco, California, By: Arthur B. Dunne, Esquire and James R. Baird, Jr., Esquire.

On behalf of Defendant Westbound Conference and defendant carriers in that Conference:

Messrs. Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco, California, By: Edward D. Ransom, Esquire, William H. King, Esquire.

On behalf of Co-defendant Far East Conference:

Elkan Turk, Jr., Esquire, 120 Broadway, New York 5, New York.

On behalf of Defendant-Intervener Federal Maritime Commission:

Robert B. Hood, Jr., Esquire, Federal Maritime Commission, Washington 25, D. C.

[fol. 63]

Monday, April 8, 1963 2:00 o'clock p.m.

The Court: All right, gentlemen. Whenever you are ready.

The Clerk: Civil Action 41,153. Carnation Company versus Pacific Westbound Conference. Motion to dismiss and motion for Federal Maritime Commission for leave to intervene as defendant.

Will counsel please state their appearances for the record.

Mr. Ransom: Edward D. Ransom of Lillick, Geary, Wheat, Adams & Charles, counsel for the defendant Pacific Westbound Conference and the defendant carriers in that Conference.

With the leave of this Court, which I hope will be granted, Elkan Turk, Jr., from New York City for the Far East Conference and its member-line carriers, co-defendant in this case.

The Court: We are glad to grant the motion. We welcome you.

We had some lawyers in our last trial from New York. I hope we treated them all right.

Mr. Ransom: Also with the leave of the Court, Robert B. Hood, Jr., for the Federal Maritime Commission.

Mr. Dunne: For the plaintiff, Arthur B. Dunne and [fol. 64] James R. Baird, Jr.

Mr. Ransom: May I formally move for the admission for the purpose of this proceeding Mr. Elkan Turk, Jr., member of the Bar of New York, and Mr. Robert Hood, Jr., member of the Bar of Virginia.

The Court: No objection. I am glad to grant the motion for appearance in this court for this case.

COLLOQUY BETWEEN COURT AND COUNSEL

Gentlemen, I have read, as best I could, the memoranda and I have an abstract of the situation before me. I do not claim to know all about it, but as I understand it, this is an action brought under the Sherman and Clayton Acts. It is in the nature of an antitrust action against these defendants. It arises out of a claim that the defendants entered into an agreement to fix certain shipping rates, and the charge is that this was a conspiratorial agreement contrary to antitrust.

The defendants point out that any rates which they charge are supposed to be approved by the Federal Maritime Commission although these particular rates involved, as far as I can understand the matter, were not actually approved.

As I understand it, the fixing of rates without approval of the Federal Maritime Commission is unlawful and contrary to the terms of the Shipping Act itself.

The Federal Maritime Commission asks leave to intervene in this case for the purpose of making a motion to dismiss the Complaint. The defendants also move to dismiss the Complaint.

[fol. 65] The dismissals, as I understand it, are asked upon the ground that the Federal Maritime Commission has the primary exclusive jurisdiction over these matters.

The defendants, however, take the position, as I read your briefs, that since these particular rates were not approved by the Federal Maritime Commission that they are just an ordinary garden-variety part of some conspiratorial antitrust agreement and that the Federal Maritime Commission has nothing to do with it.

Let me ask this one question before we get going on the matter: Am I correct in assuming that it is admitted here that the rates which are the subject of this suit or a part of the alleged conspiracy were not in fact approved by the Federal Maritime Commission?

STATEMENT BY MR. RANSOM ON BEHALF OF DEFENDANT, WESTBOUND CONFERENCE, ET AL.

Mr. Ransom: If Your Honor please, that is approximately correct. It is not really the rate that is approved. It is the agreement, the method of fixing the rates, the agreement by which the rates were arrived at. It is our position, Your Honor, that in fact they were and that this is an issue in the case which will have to be determined in the case, whether or not the approvals of the agreements which have been approved cover the particular transaction of which the plaintiff complains.

The Court: Let me ask this question: Does the Shipping [fol. 66] Act contain provisions whereby shippers can under certain circumstances and with the approval of the Maritime Commission enter into agreed tariffs? Agree upon tariffs among themselves?

Mr. Ransom: You mean the carriers. Yes, it does.

The Court: That is why it has the provision that if that type of agreement is approved it is taken out of the antitrust action.

Mr. Ransom: It is our position, Your Honor, and I really have to almost argue the case to answer that, that while there is an express exception out of the antitrust for that which is approved, the exception from the antitrust laws under the cases which have been decided, under the doctrine of primary jurisdiction, whether approved or not approved,

it still comes within the Shipping Act, its set of regulations, and is taken out of the Court's power to—

The Court: You cite certain cases which you say hold that?

Mr. Ransom: Yes, Your Honor.

The Court: Do I understand you to say that these cases which you have cited actually hold as they appear to hold, that even though the rates involved or the agreements for rates involved have not been approved, actually approved, by the Maritime Commission, that nevertheless the subject matter of those agreements and rates is within the exclusive [fol. 67] primary jurisdiction of the Federal Maritime Commission?

Mr. Ransom: Very definitely, Your Honor.

The Court: If the cases hold as you say they do, isn't that the end of this matter?

Mr. Ransom: Precisely, Your Honor.

The Court: Let's ask counsel for the other side if they have any contention to the contrary.

You have just heard the statement of counsel made here concerning the cases. I have not read them, but that is counsel's version of them. I would like to ask the plaintiff if the cases do hold that when agreements are made between carriers for fixing rates, if that is the term to use, that, then, even though those agreements and rates have not been approved by the Maritime Commission that nevertheless the subject matter is still the primary exclusive jurisdiction of the Federal Maritime Commission.

Mr. Dunne: It is our position that the cases do not so hold.

The Court: That is what I wanted to hear.

Mr. Dunne: If we can get right down to what I think it is, it becomes comparatively simple.

Counsel very correctly told Your Honor with respect to rates of foreign carriers.

Now, Your Honor will have an occasion to look at the [fol. 68] Shipping Act. I call Your Honor's attention to the fact that in dealing with carriers by water it deals with two

classes of carriers; carriers in interstate commerce, or domestic carriers, and carriers in foreign commerce. The first section of the Act is very explicit in its definitions of carriers in foreign commerce and carriers in interstate commerce. The provisions of the Act are different in some respects with respect to carriers in foreign commerce and carriers in domestic commerce.

The Court: Would they be different in the connection that counsel has referred to these cases?

Mr. Dunne: Yes, Your Honor.

The Court: You, then, make a distinction between interstate commerce and foreign commerce?

Mr. Dunne: That is correct, because of certain provisions of the Act with respect to filing of tariffs by domestic carriers and the maintaining of reasonable rates by domestic carriers. There are provisions that apply to all of them about preferences and discrimination, but with respect to the rates of domestic carriers the scheme is very much like the scheme of the Interstate Commerce Act as to the carriers by railroad for the filing of tariffs and maintaining of reasonable rates. My recollection is that they charge only the rates that are filed.

The scheme as to rates as to foreign carriers is quite dif- [fol. 69] ferent. At least it was before the amendment of 1961. I want to call Your Honor's attention to the fact that this case arises before the 1961 amendment. The 1961 amendment changed the scheme of regulation as to foreign carriers, carriers in foreign commerce, to make it very much like that of railroads and like that for domestic carriers requiring that rates be filed and that the carriers collect neither anything more nor less and different from the filed rates. But until the 1961 amendment the scheme of this Act as to foreign carriers in foreign commerce was quite different as to rates.

The Court: Before you get into the distinction, let me ask you this question: With respect to interstate carriers, would counsel's version of the cases be substantially correct?

Mr. Dunne: Certainly would in certain respects as to rail carriers. One of the cases they rely on is the Teal case, common carriers by railroad. As far as I know, none of us have cited any case that touches on that exact point, even on domestic water carriers.

As to the rail carriers, the leading case there, as to the file and approved rates, is the Teal case.

The Court: In other words, counsel would be correct if he said that there are cases which hold, let us say, that interstate rail agreements and rates, even though not actually approved by the Maritime Commission, would remain [fol. 70] within the exclusive primary jurisdiction of the Commission.

Mr. Dunne: The Maritime Commission applies, of course, only to carriers by water.

You put a question as to rail carriers.

The Court: That is right. An analogy.

Mr. Dunne: The situation as to rail carriers is slightly complicated.

The Court: Well, let's stay away from the rail carriers.

Let me ask counsel this question. I am going to let you go your own way later on. I just want to see if we can narrow it down a little bit.

Mr. Ransom, will you state again your version of what these cases hold as you described them before.

I am not going to interrupt your train of thought here, Mr. Dunne. You can later on go into this in your own way. I am making it a little difficult, I guess, for you now.

Mr. Dunne: Your Honor is trying to see if we cannot meet head-on on this.

The Court: That is right.

Mr. Ransom: I think we can, Your Honor.

The Court: You state how we can, then. Generally there is an issue in these cases and sometimes it is a very circuitous route by which we try to get at those issues, and I am trying to see if we cannot cut through and see if there is [fol. 71] not an issue of fact or law, or whatever it is, between you people that at least you can agree on the issue.

Mr. Ransom: Your Honor, I do not think this question of the difference in how rates are made up, foreign or domestic, goes to the essence of this case at all. What Carnation is complaining about is that a rate was set by reason of agreements between these carriers and that the agreements were beyond the scope of agreements which had been approved. Therefore, they say the agreements by which these rates were set were unapproved, and being unapproved they are subject to the Antitrust Laws.

We say whether approved or not approved they are still subject to the Shipping Act and unapproved agreements making rates between foreign carriers is unlawful under the Shipping Act. The Shipping Act is the act which deals with that particular unlawfulness and that the Sherman Act to that extent is superseded.

Now, we also say, and this is an issue of fact, that the agreement which was approved was broad enough to include in fact the actions of these parties so that we will contend as a factual matter and a legal matter in the Commission when we are there, or if we have to, in this Court, that you do not ever really reach the question of approved or unapproved because we acted under an approved agreement.

Now, this is an issue where we say this is an issue of dis-
[fol. 72] agreement. The further issue of disagreement is:

Assuming we are wrong about whether we are approved or disapproved, Mr. Dunne and Carnation Company say if that is the case you are at large under the Antitrust Laws. We say: no, the courts have decided that question and we are still under the Shipping Act and we are not under the Antitrust Laws.

The Court: All right. Let's get a little specific. What are those cases that you say have established that proposition?

Mr. Ransom: I would like to review them at some length.

The Court: Before we review them at length, and we probably will have to, do you know offhand which ones they are?

Mr. Ransom: Yes, Your Honor. It is United States Navigation Company against Cunard, which was decided in 1932; the Far East Conference against United States, de-

cided in 1952. Those are the two Supreme Court cases. Those deal with injunction proceedings.

The third case which settled the issue for all time, as far as we believe, is the American Union Transport against River Plate and Brazil Conference. That is a District Court decision of the District of New York, affirmed without even writing an opinion.

[fol. 73] The Court: Yes. That is the 1954 case.

Mr. Ransom: Yes.

The Court: Those are the three cases?

Mr. Ransom: Those are the three cases which we think this case should be decided on without the necessity of referring to any other cases, and those are the cases we say hit the issue right exactly between us.

The Court: Will you just, then, if you will, state for me as concisely as you can what those cases hold.

Mr. Ransom: I will endeavor to.

I should add this, if Your Honor please, that all these three cases concern themselves with not domestic water carriers but water carriers in foreign commerce that we are concerned with here.

The Court: You say these three cases deal with water carriers in foreign commerce as in this case

Mr. Ransom: As in this case.

Now, the first one, the Cunard case was a suit—Do you wish me to—

The Court: Let's start with the general and then get down to the details. I may not be able to understand it if you get too much detail. Tell me what you think they hold just a plain garden-variety statement as to what you think they hold related to this case.

Mr. Ransom: These cases hold, if Your Honor please, [fol. 74] that where an agreement is entered into between carriers in foreign commerce of an antitrust, anticompetitive nature, a rate-making agreement, and the agreement has not either been submitted to or approved by the Federal Maritime Commission, the parties find their remedy they must seek their remedy under the Shipping Act be-

cause the Shipping Act has for the steamship industry a scheme of regulations, a scheme of antitrust regulations, which applies as to that industry and which is the exclusive remedy for matters which come within or which relate to agreements of a shipping act section 15 type. I think that is exactly what they hold.

The Court: Let's put it this way: If they do hold that, I take it from your statement that they would be dispositive of this case because, as you have described them, they seem to be on all fours. Is that correct?

Mr. Ransom: Yes, Your Honor. I would say the only attempt that I can see, the only possibility of trying to distinguish these cases from our case, is that in the two Supreme Court cases an injunction was sought. In the first one it was sought by a private party to enjoin action under an unapproved agreement. In the second one the injunction was sought by the Government to enjoin action under an unapproved agreement entered into by carriers in foreign commerce. In neither case is there any indication or hint or suggestion that the fact that they are seeking an injunction has anything to do with the theory of the case.

[fol. 75] The reason that I cite to Your Honor the third case is that it dealt with treble damages. It was as Carnation here. It sought treble damages under the Antitrust Act. The Court there had the benefit of the opinion in the Cunard case and in the Far East case, and the Court there again dismissed the treble-damage action.

I should say, also, that of these cases there was a dissent in the Far East Conference case by Mr. Justice Douglas.

The Court: That is the last one?

Mr. Ransom: That is the second of the two Supreme Court cases.

Mr. Justice Douglas' dissent presented the same argument which Carnation has presented here in its brief; namely, if you do not have an approval you do not have an exception.

The Court discussed Mr. Justice Douglas' dissent and said: whether there is merit to it or not merit, we are bound

by the decision of the Supreme Court in the Cunard and the majority in the Far East. So this point was argued in that case, if Your Honor please.

I should also like to point out that the Cunard decision was a unanimous decision of all nine Justices, written by Mr. Justice Sutherland.

[fol. 76] The Court: I will have to read that myself.

Mr. Ransom: It is very unusual, Your Honor. It had on the Court at that time such quite well known Justices as Justice Holmes and Justice Brandeis.

In the Far East case, six out of the eight of the Supreme Court Justices were in favor of our position.

Stepping back a moment, in the Cunard case in the Second Circuit, Judge Augustus Hand wrote the opinion, which I think is a classic. All the arguments that could have been brought up were disposed of. Justice Learned Hand concurred with it.

The A.U.T. case, which I mentioned, was by Judge Edelstein in New York. When it got to the Second Circuit, Justices Clark, Medina and Dimock adopted the opinion, considering that the law was so well established that there was no need to write a further opinion.

Now, there are other cases besides these that follow then, but those three cases we say are definitely dispositive of this case.

The Court: Let's stop here for a minute.

Mr. Dunne, you have heard that version of the situation.

STATEMENT BY MR. DUNNE ON BEHALF OF PLAINTIFF

Mr. Dunne: And you would like me to be just as short and concise and confine myself to a few main authorities as counsel from the other side.

[fol. 77] Now, our first proposition, and I do not understand it to be disputed directly, is this: Section 15 of the Shipping Act, actually providing that carriers in foreign commerce might enter into agreements to fix rates, should be lawful when approved by the Federal Maritime Commission.

Now, we are all going to refer to it as the Commission. There have been various agencies from time to time which have been charged with the administration of this Act.

They then should be lawful. It provided that to carry out unapproved agreements was unlawful. Then it said this:

> "Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions"—

I am reading now from the Code.

> "of Sections 1-11 and 15 of Title 15 and amendments and Act supplementary thereto."

So it provided a method of getting an exemption from the antitrust statutes which were by approval by the Federal Maritime Commission.

On Page 6 of our brief we have cited cases. The last one which we have quoted is California against Federal Power Commission approving the holding in Maryland and Virginia, the Bar Association, and so forth, for the proposition that when Congress has provided a method for exemption [fol. 78] from the antitrust statutes you get an exemption only in the way provided for by Congress. That is one point upon which we have never really met anywhere.

Now, the second thing is this. Counsel calls your attention to the Cunard case and the Far East case, two decisions of the Supreme Court of the United States. We are going to submit to Your Honor that aside from this first point, the question which Your Honor eventually is going to decide is this: Is the case in hand controlled by Cunard or is the case in hand controlled by Great Northern against Merchants Elevator, 259 U.S. 285.

Now, there is a very significant thing about Great Northern against Merchants Elevator. It is cited and quoted at great length, and is the principal reliance of Justice Sutherland in the Cunard case. In due time when we argue this I will point out where Great Northern fits into this whole picture. I just say now it was Mr. Justice Sutherland's princi-

pal reliance, with a long quotation, for the explanation of the doctrine upon which he was relying in Cunard. When we get to the facts of this case, then I will point out to Your Honor what Great Northern against Merchants Elevator holds. Well, it is not exactly flippant, but in an endeavor in the closing brief to dispose of the Merchants Elevator case, it is pointed out somewhat solemnly that the case was decided in 1922.

[fol. 79] But in the United States against Western Pacific Railroad Company, 352 U.S. 59, Mr. Justice Harlan was very careful to point out that the Court reaffirmed and adhered to the distinction made in Great Northern against Merchants Elevator. So it is not a case, by any means, that has lost its vitality.

The Court: Let's call it the Great Northern case.

Mr. Dunne: Yes, Your Honor.

In due time we will enlarge on that, Your Honor.

Now, to go back to the two United States Supreme Court cases that counsel has called Your Honor's attention to, the Cunard case and the Far East Conference case, Mr. Chief Justice Warren in his landmark opinion in this field in United States against Radio Corporation of America, RCA, 358 U.S. 334, undertook some discussion of the United States Supreme Court decisions in this field and noticed both Cunard and Far East Conference. He cited them both but he cited them this way, as explained in Federal Maritime Board against Isbrandtsen Co., 356 U.S. 481—

The Court: In what? Federal Maritime—?

Mr. Dunne: Federal Maritime Board against Isbrandtsen Co., 356 U.S. 481.

When we come down to that case, when we compare on the one hand the case upon which Cunard relied, the Great Northern case, and its theory, and, then, on the other hand [fol. 80] look at the reaffirmation of the theory of Great Northern in Isbrandtsen, and Mr. Chief Justice Warren's citation of Cunard and Far East, but as explained in Isbrandtsen, I think we will come down to the nub of the issue in the case.

Your Honor wanted a very short statement of what we think are the few controlling authorities, although there are

other decisions of the Supreme Court that deal with various facets.

The Court: Let me ask you a few questions so I can get these in order. What was the date of Far East and Cunard, each of those cases? If you know.

Mr. King: Cunard was 1932, Your Honor, and Far East was 1952. Federal Maritime Board against Isbrandtsen was 1958.

Mr. Dunne: Great Northern is 259 U.S., and that would come before Cunard. About 1932, or so.

Mr. King: 1922.

The Court: U.S. versus Western Pacific, approximately?

Mr. Dunne: That is 1961 or so. U.S. against RCA, that is a little later. That is 358. That is about 1961 or '62. No. It is farther back than that.

The Court: Approximately.

Mr. Dunne: It is in the late fifties. These cases come after Far East Conference.

The Court: Your position is, then, that these cases that he cites, properly read, properly understood, are not ap-
[fol. 81] plicable to this?

Mr. Dunne: Have nothing to do with this case. This is a simple overcharge case which falls squarely within Great Northern. There is not an administrative question in this case. It is a plain case of charging more than the only lawful rate and doing it because there was a conspiracy in violation of the antitrust statutes.

The Court: This is not an action, if there is such an action, provided under the Shipping Act to collect overcharges or recover overcharges, is it?

Mr. Dunne: Not under the Shipping Act, no, because the overcharge was unlawful under the antitrust statutes.

The Court: You mean arguendo.

Mr. Dunne: That is right. It is not remitted to the Shipping Act because the Shipping Act cannot give us the full remedy we are entitled to under Antitrust Acts.

The Court: What remedy does the Shipping Act give?

Mr. Dunne: It has a two-year limitation, whereas we have four under the antitrust. They give single damages; we get

treble in antitrust. If it is a jury trial, under the antitrust statutes the Government awards attorney fees whereas the Shipping Board Commission cannot give us anything.

The Court: The Shipping Act gives what, a two-year limited right to what?

Mr. Dunne: Reparations.

[fol. 82] The Court: To reparations. By a suit?

Mr. Dunne: By a proceeding before the Commission.

The Court: By a proceeding before the Commission.

Mr. Dunne: That is right.

The Court: Whereas by proceeding under the Antitrust Act you have more time, the right to a jury trial, and et cetera.

Mr. Dunne: In other words, we should point out that the remedy under the Shipping Act does not displace any remedy under the Antitrust Act assuming the same conduct violates both the Shipping Act and the Antitrust Act because it does not give the complete remedy and does not displace the other remedies.

The Court: Maybe this would be the time for you to tell me as briefly as you can, remembering that you can go into detail later to any extent you wish, just what you mean when you say that those cases referred to by Mr. Ransom, on which he has given his version, are distinguishable in the light of, let us say, Great Northern.

Mr. Dunne: Great Northern—

The Court: Before you do it, let me see if I can repeat what he said. He said that where agreements between carriers in foreign commerce have not been submitted to or approved by FMC, the parties must seek their remedies under the Shipping Act because it has a scheme of antitrust regu-[fol. 83] lation, and so forth, and that this is exclusive. He says that that in effect is what has been held by Far East, by Cunard, and followed by what we will call Brazil.

Mr. Ransom: American Union Transport versus River Plate and Brazil Conference.

The Court: Now, you must say and you say impliedly, that it really cannot hold exactly that.

Mr. Dunne: That is right.

The Court: What do these three cases hold, that is, Far East, Cunard, and the New York case, according to your version in the light of, let us say, Great Northern? Very briefly.

Mr. Dunne: Let me put Great Northern on its very lowest common terms. I have to go back just a little bit to do that.

Of course, the fountainhead about which we are all talking about is Mr. Chief Justice Fuller's opinion in the Texas versus Abiline Cotton Oil Company case. He held in that case that where there was a regulatory statute—in this case the Interstate Commerce Act, which had set up, to use a later expression of Mr. Chief Justice Warren, a pervasive scheme of regulation of the particular industry, that there were certain things that were committed to that Commission, it would act on certain matters, and where uniformity was essential to the whole regulatory scheme, and particu- [fol. 84] larly where the question upon which uniformity turns, was not a question of law which could be resolved for everybody by an appeal to the United States Supreme Court.

I am not relying on my imagination on this. The cases have later pointed that out.

But where it turned on question of fact—and as Your Honor knows, the courts on question of fact can only bind the parties immediately before them—that in such cases to determine who should act, then in aid of the general regulatory scheme, so that it should be applied generally, the regulatory commission should be permitted to act. That is the beginning of the primary jurisdiction doctrine.

Following that, there were a series of cases involving railroad rates in which it was held that these disputes over these rates amount to a question upon which there must be u...formity. Indeed, as Mr. Justice Brandeis pointed out in the Great Northern case, it may also require some expertise. Those cases had to go to the Commission first. Then came along Great Northern. Now, in Great Northern there was an overcharge, or so it was claimed, and the suit was

brought to collect that overcharge without first going to the Interstate Commerce Commission.

The Supreme Court of the United States looked at the matter and said: this is just a question of construction of a tariff, it is a question of law. A decision of the United [fol. 85] States Supreme Court will establish uniformity on this question of law. We can construe this tariff as well as anybody else can. Accordingly they held that that overcharge did not present an administrative question which must first go to the Interstate Commerce Commission but that the matter might be presented in the courts.

That case held that the primary jurisdiction doctrine did not require resort to the administrative agency before bringing suit in court, when there was no intricate question of fact, there was no question of upsetting a general regulatory scheme. It was a simple question of construction of a tariff. If the tariff was construed one way, it was an overcharge; if it was construed the other way, there was not an overcharge. Now, that has been compared with Cunard.

Going back some considerable time, water carriers, at least water carriers in foreign commerce, having organized conferences with approved conference rates, the agreement to fix rates was approved, and then they issued their rates. Under some of those approved agreements, these conferences set up the so-called dual rate structure. That was this kind of a scheme. They would set up the regular tariff rates and anybody who offered shipments to them, who ordered their service, could have it, paying those rates. But if the shipper would agree to ship only in conference bottoms, then he got a lower rate. This question of the validity of [fol. 86] this dual rates has been going on in the Commission and before the courts and even before the Congress, and finally was upset by the Isbrandtsen case, and they had to go to Congress for legislation to change that situation, and eventually did get legislation. They got a moratorium statute for awhile and then some more permanent legislation.

The United States Navigation brought an action under the antitrust statutes. It was not a conference member and it claimed that this agreement for this dual-rate structure was illegal under the Antitrust Laws, and so it brought an action under the Antitrust Laws only for an injunction, not for mere damages for past conduct, but an injunction which would be prospective in its operation. Now, there were two things that were peculiar about that.

The Court: Pardon me. What case are we talking about?

Mr. Dunne: Cunard. United States Navigation Company against Cunard Steamship Company. The question was when there is an attack on dual-rate structure and when the question is whether or not it is valid or whether or not it falls within the original approval of a conference agreement, you have got a question of such nature that you ought to go to the Federal Maritime Commission first and not sue first.

Now, remembering that the relief that was sought there was by way of injunction only, Judge Hand in the Court of [fol. 87] Appeals in the Second Circuit Court pointed out this peculiar thing that would happen. He said, suppose the Court went ahead and gave relief here and issued an injunction and then the dual-rate structure is submitted to the Federal Commission and be approved. It might be approved even while the case is pending out of court. In view of the fact that the only remedy sought was prospective in operation by way of an injunction.

Mr. Justice Sutherland who did not adopt that line of reasoning, or at least did not mention it in his opinion, but his general line of reasoning was this: this is a complicated industry. It is not within the general province of Courts to know about the details of an industry like the shipping industry and how a whole rate structure is constructed, and it is something upon which there should be uniformity and regularity.

Now, I do not want counsel on the other side to get up and tell me that I haven't accurately quoted the case because I do not pretend to quote the case. I am stating to Your

Honor my reading of the case and my interpretation of the case.

So Mr. Justice Sutherland, looking at the distinctions made in the Great Northern itself, said this kind of a case is a case for an administrative remedy first. Let me carry that on just very briefly, and if necessary we can now dis- [fol. 88] cuss the details of that. That was a suit by the United States Navigation Company, private suitor. Some time later in the Far East Conference case the United States itself made an attack on the dual-rate structure. Mr. Justice Frankfurter wrote the opinion in Far East Conference, and he said—the relief there being asked, of course, was prospective in operation only. He said, why, this is just like Cunard. This is asking for relief in the future, injunctive relief on this dual-rate structure; what difference whether the United States is the plaintiff or whether it is a private suitor; it is the same type of question. He said this is a primary question for the administrative agency.

Then comes up something that is extremely interesting in Far East Conference. He then said shall we dismiss or shall we retain this case until we see what the agency does.

Your Honor must remember that the agency here had the power to issue a cease and desist order which in effect is an injunction. So he said in this case we are going to dismiss because the Commission can give the United States all the relief to which it is entitled. Then he added a very significant sentence, which in effect is this, but if it does not, then the Government can bring a similar suit. There is only one way to read Mr. Justice Frankfurter's opinion in that case, and that is: we will dismiss, we won't pertain.

[fol. 89] No. 1, because the Government can get all the relief to which it is entitled and which it seeks before the Commission, but if it does not, then, there will be time enough for it to complain, and in that event it can bring a similar suit, which was a suit for injunctive relief under the Antitrust Laws.

Let me call Your Honor's attention to one other thing. I do not think there is any mistake about what we had to say about this in our brief but there has been an attempt to cast

a few stones at it. If Your Honor will read Mr. Justice Frankfurter's dissent in the Isbrandtsen case, if you will look at that dissent, it is an extremely important dissent because it is his reading of what the majority was doing so far as Cunard and their decision in Isbrandtsen.

This is a pretty long answer to a rather simple question which Your Honor put as to what do we think that Cunard holds. We think Cunard with its explanation in effect in Far East Conference where Mr. Justice Frankfurter points out that two remedies that the Court can have, either by retaining and waiting to see what the Commission is going to do, or either by dismissal, because if they do not get all the relief they want they can still bring an action.

Then, if you will read the majority opinion in the Isbrandtsen and the way it is highlighted by Mr. Justice Frankfurter's dissent, Your Honor will then see why it is we say that Cunard is not controlling here, but the case that is [fol. 90] controlling here is the case that Cunard relied on, which is Great Northern.

Your Honor, we are caught in a curious bind. One brief on the other side accuses us of being entirely too pedantic and introducing into this matter a heap of confusion. One of the other briefs on the other side said we are oversimplifying it. I do not know quite where we stand.

The Court: Plead guilty to both.

All right. Fine. We can hear from you later on this.

Mr. Dunne: Yes. As I understood Your Honor, you wanted me to present our central line of argument, what we have, and then these modifications, details, and peripheral decisions can be dealt with later.

The Court: That is right.

Mr. Ransom, you have now heard Mr. Dunne's comments. Who wants to be heard on that?

Argument by Mr. Turk on Behalf of Co-defendent, Far East Conference

Mr. Turk: Your Honor, that depends somewhat on whether you are ready to hear us present our arguments in

the order in which we had planned to make them or whether you wish—

The Court: I would like to hear without reference to your agenda, just to stand up here and tell me what is wrong with Mr. Dunne's picture.

Mr. Turk: Quite a few things in our view of it, Your Honor.

[fol. 91] In the first place, the Great Northern case was strictly a question of primary jurisdiction under the Interstate Commerce Act. There was no question there of the relationship between the Antitrust Laws and the Interstate Commerce Act. What has not been fully emphasized here is the manner in which the Supreme Court dealt with, first, the question of the relationship between the Antitrust Laws and the Shipping Act in both United States against Cunard and the Far East case, and then proceeded to decide where the proceedings should be tried.

Now, you will observe in reading United States Navigation against Cunard—

The Court: Let's call these by familiar names. Cunard, Far East, Great Northern. If you mention the defendants, sometimes I think you are talking about another case.

Mr. Turk: All right.

In Cunard the Court at the outset stated the nature of the charges and then it made a review of the provisions of the Shipping Act and it found that the provisions of the Shipping Act fully covered every detail of the conduct charged to be unlawful by the antitrust complaint, finding full remedial and substantive procedure in the Shipping Act. The Court did not say this is a technical matter and we will get rid of it. It said the Shipping Act pro tonto supersedes the [fol. 92] Antitrust Laws.

Then it had the question of what do we do with a Shipping Act case charging an unfiled agreement among common carriers by water.

It examined Section 15 of the Shipping Act which makes it unlawful to carry out an unfiled agreement among common carriers by water and said, well, there is no remedy un-

der Section 16 of the Clayton Act because that is as we have said before, it has been superseded, and even though this agreement that is charged in U.S. Navigation, its complaint looks pretty bad and looks horrible to a judge, it is entirely possible that on a full consideration of all the economic factors involved the then Shipping Board might approve it and we will not attempt to decide that in court, but following the primary jurisdiction doctrine, the question was referred to the Shipping Board.

At least the plaintiff was remitted to seek his remedy there.

The same question arose in Far East. Again, you had an antitrust complaint by the United States. Right at the outset Mr. Justice Frankfurter, who did write the majority opinion in this case, said we had a problem here of considering the relationship between the Antitrust Laws and the Shipping Act. U.S. Navigation against Cunard answers our problem and the Court proceeded on the theory that the [fol. 93] Antitrust Laws, again, have been superseded insofar as the agreements of common carriers by water are concerned.

Disagreeing with the District Judge in that case, Judge Frankfurter stated that the Attorney General had a right to bring a complaint before the Federal Maritime Board as it then was charging the very conduct which he was charging in his Antitrust complaint.

I think it must be clarified here what the gist of the grievance here is. Now, it may seem presumptuous of the defendants to tell the plaintiff what his gripe is, but still I think that we must analyze that in order to appreciate the application of supersession first, and then primary jurisdiction. There has been a lot of talk here about the power of the Federal Maritime Commission over its rates and agreements. The two are quite different.

Carriers in foreign commerce are authorized to initiate rates individually or pursuant to approved agreements and there is no requirement of approval of the individual rates, and until quite recently there was no provision for suspension and a determination as to reasonableness. But it is

equally true that interstate carriers do not have to get advance approval of their rates. They file their rates. After they have been on file after a stated period they become lawful rates unless the Commission on its own motion, Interstate Commerce Commission, or some other carrier or ship-
[fol. 94] per brings a suspension proceeding and attacks the rates. So there is not quite all this great difference between ocean foreign commerce rates and domestic rail rates as it first may have appeared.

Secondly, and most important, Section 15 of the Shipping Act specifically requires the filing with the Commission of any agreement for the fixing of rates or the limiting or destroying of competition, pooling, allocation of traffic, et cetera. That is not limited to domestic commerce. It applies, or it at least had applied originally, with equal vigor to domestic or foreign commerce.

In 1940 the Water Carriers Act transferred jurisdiction over strictly interstate rates to the Interstate Commerce Commission and at the same time repealed the Shipping Act insofar as it applied to carriers who were going to be regulated thereafter by the Interstate Commerce Commission.

So far as having a domestic regulatory act here, the Shipping Act has the exclusive application to foreign commerce.

I think the air should be cleared on this subject. These agreements that are charged here are agreements of carriers of foreign commerce. Section 15 applies with full force to agreements of carriers in foreign commerce.

Now, Section 15, after prescribing the filing of these
[fol. 95] agreements, tells the Commission that if it makes findings that these agreements are unjustly discriminatory among carriers, shippers or ports, or discriminate against American exporters as compared with their foreign competitors, something that Carnation refers to in its complaint, or are detrimental to the commerce of the United States or violate any other section of the Shipping Act, the Commission shall disapprove such agreement, otherwise it shall approve the agreement.

A further paragraph of Section 15 states that it is unlawful to carry out an agreement before or after approval. The further paragraph of Section 15 states that anybody who violates any provision of this section shall be liable to a civil penalty. It used to be a flat $1,000 a day. Since 1961 it is up to a thousand dollars for each day that the violation continues.

The reason I am bothering you with the details of what Section 15 describes as to the agreements which must be filed, what it says the Commission is entitled to do, the standards that are applied under the statute by the Commission and what the penalty is, is to give Your Honor a full appreciation of the fact that an agreement among common carriers by water in foreign commerce, free competition, is subject to the fullest kind of regulatory scheme under Section 15.

[fol. 96] The Court: What I am interested in right now is something just specifically to Mr. Dunne's statement which was generally to the effect that the Cunard and the Far East cases involved application for injunctive relief only, prospective relief, and that that some way or another distinguishes those cases from Great Northern which was an attempt to collect overcharges in the courts without going to the Commission and on which it was held that the issue involved only the question of law and that it was not an administrative question.

But before hearing from you on that, let's give this reporter a little recess.

(Recess taken.)

Mr. Turk: Your Honor, I will bring myself directly to the question you put before me before the recess; namely, where do we stand on this question of injunction versus treble damages. I think there are two answers to that. One is the easy one. In the cases under the Shipping Act or involving carriers subject to the Shipping Act regulations where complaints have been brought under the Sherman Act seeking treble damages, they have been dismissed.

Now, the leading case on that, of course, is the American Union Transport.

The Court: You are referring to some other case now?

Mr. Turk: No. I think you have that listed.

[fol. 97] The Court: Is that the New York case? That is the Antitrust Act.

Mr. Turk: Yes.

The Court: As I understand it, that case was ordered dismissed on the authority of Far East and Cunard.

Mr. Turk: Exactly.

The Court: I am trying to find out, though, from you what you think is wrong with Mr. Dunne's attempt to distinguish these three cases by reference to other cases referred to in some of these decisions.

Mr. Turk: You mean, for example, his reference to the recent cases of California against Federal Power Commission?

The Court: No, I do not.

Mr. Turk: I do not—

The Court: Well, you heard his statement in answer to your version of what these cases hold.

Mr. Turk: You mean his reference to the Isbrandtsen decision?

The Court: Isbrandtsen, Great Northern . . . In other words, why do you think that Mr. Dunne has attempted to tell me to distinguish these three case?

Mr. Turk: That is a very long story.

The Court: Make it a short one.

Mr. Turk: Let's start out with the Isbrandtsen decision of 1958. Mr. Dunne says in his brief and in his argument [fol. 98] that that explains away U.S. Navigation and Far East Conference as authorities requiring the application of the supersession and primary jurisdiction doctrines. I think this involves misapprehension as to what went on between the majority and the dissent in the Isbrandtsen case.

In the first place, I think we must emphasize that Isbrandtsen was not an antitrust case and it was not even a primary jurisdiction case. It arose under the Review Act of 1950 to review an order of the Maritime Commission granting Section 15 approval to one of these dual-rate con-

tract systems. The case first came up in the District of Columbia Circuit and that Court held that these dual-rate systems are rendered illegal, per se, by Section 14 of the Shipping Act.

One of the questions presented to the Supreme Court was that was the Court below correct in holding that these are illegal proceedings.

Now, arguing there for the conference there involved, it was asserted that these earlier cases of Cunard and Far East Conference could not have been decided the way they were if the Court, the Supreme Court, had entertained the notion that these dual-rate systems were illegal per se. Someone on the Great Northern argued that if it were simple question of law the Court would not have had to defer to the administrative agency for its expertise; the Court would have said, well, maybe the Antitrust Laws do not apply but under Section 14 of the Shipping Act these sys- [fol. 99] tems are so clearly illegal that we will grant an injunction under the Shipping Act.

Well, we were repulsed in that argument. The majority in the Isbrandtsen said: no, that this is not a correct interpretation of those earlier decisions; the primary jurisdiction doctrine applies to give the Court the benefit of a preliminary consideration by the expert agency which can compile a full factual record and develop all of the economic situations involved; then when the agency is done we still have the right to say whether their result was correct under the law.

It should be noted that the majority in the Isbrandtsen did not hold contract rate systems to be unlawful per se. They said that they are unlawful if they have certain attributes, if they are predatory, stifle competition, et cetera.

Mr. Justice Frankfurter in his dissent in Isbrandtsen almost quarreled with the good faith of the majority. He reviewed the history of these dual-rate systems and said they are always used to meet competition and to protect the carryings of conferences as against non-conference lines so that in effect the majority of today ruled them illegal per se

even though they do not come out and say it. He says that in so doing I think that they go contrary to the necessary [fol. 100] implication of Far East and U.S. Navigation against Cunard. This has nothing to do at all with the issue of supersession and the issue of primary jurisdiction in U.S. Navigation and Far East with which we are concerned with here.

Our position is that Isbrandtsen has nothing to do with the present case.

The Court: What about Great Northern?

Mr. Turk: Great Northern, again, as I believe I said before—if I did I think it bears repetition—was not an anti-trust case. It was a case brought to recover a charge claimed to have been excessive under the tariff.

Now, in that connection I think it must be remembered that Section 9 of the Interstate Commerce Act gives persons who claim that they had been injured by a carrier subject to that act the right to proceed either before the Interstate Commerce Commission or before a Court so that there has had to evolve some philosophy of what type of question is more appropriate for administrative consideration and what type of question is appropriate for judicial decision.

The Court said all that is involved here is a reading and interpretation of a tariff provision. The Courts read contracts, wills, and statutes every day of the week; that is the kind of thing we can do; and as long as there is no technical question of the nature of the commodity and its use with which we are not familiar, we can decide the case as well as [fol. 101] the Commission.

The Court: Right. Suppose that the plaintiff here was bringing the suit in this court to collect a claim for excessive charges. Would he then be in the same position as Great Northern?

Mr. Turk: You mean under the Shipping Act? If he was bringing a suit—

The Court: Right here in this court.

Mr. Turk: Overcharge by water carrier?

The Court: Yes.

Mr. Turk: I don't think he would for this reason, that the Shipping Act does not contain any provision giving the option to sue either by a complaint for reparations to the Commission or—

The Court: Isn't that what was held in Great Northern?

Mr. Turk: That was the Interstate Commerce Act.

The Court: That is right.

Mr. Turk: That involved a railroad regulated under I.C.C.

I think that this would be an appropriate time to say that in considering a case under any other regulatory statute you have got to be careful to compare the regulatory scheme and the provisions as far as power to award reparations, the savings of remedies under other statutes, the savings of the [fol. 102] right to proceed in court before you can conclude that that case is authority for similar result under the Shipping Act.

The Court: At any rate, in Great Northern, it was held you could bring a suit in the court to collect what was claimed overcharges beyond the tariff.

Mr. Turk: I would not agree that is an overcharge case. As I understand it, Your Honor, under the Interstate Commerce Act an overcharge has technically become the terminology for a case where for used shoes the railroad has a rate of $2.00 a hundred pounds and it charged this shipper 2.10 a hundred pounds. The difference between the tariff rate and what he was charged was an overcharge.

The Court: That is what I understand to be an overcharge.

Mr. Turk. Yes. But I think the Great Northern involved the question of whether Commodity Q which good shippers ship properly should have been charged the rate for this kind of old shoes or whether it was actually used clothing. It was a question of which was the correct tariff provision to apply rather than strictly a charge of a rate higher than the rate clearly applicable.

The Court: Your position is, then, that as far as claimed overcharges by a water carrier under the Shipping Act pro-

visions is concerned that the aggrieved party could not come [fol. 103] into court here and collect that overcharge.

Mr. Turk: That is correct.

The Court: Because the situation is different from I.C.C.

Mr. Turk: There is no choice provided under the Shipping Act to proceed either before the Commission or the Court. The only provision is in Section 22 of the Shipping Act which gives the Commission the right to award reparations for violation of the Act.

Now, I do not concede at all that this is an overcharge case.

The Court: Well, the next question I was going to ask is this: This is a suit for treble damages by reason of alleged antitrust conspiracy. I suppose it is based upon the fact that charges were made which were arrived at by unapproved agreements.

Mr. Turk: That is the gravamen of it.

The Court: That may be the gist of it but it is not specifically an overcharge case.

Mr. Turk: No, it couldn't be an overcharge case.

The Court: I do not even know whether the damages would be the same, the elements would be quite the same. I am not sure.

Mr. Turk: I think Mr. Dunne would agree that he does not claim that Carnation was charged anything in excess of [fol. 104] what the Pacific Westbound tariff showed.

Mr. Dunne: I claim Carnation is charged exactly $2.50 a ton more than the only lawful tariff.

Mr. Turk: You haven't answered my question. I guess I can't get an agreement on it.

Mr. Dunne: You cannot get an agreement from me that any kind of conduct which purports to fix a tariff which is expressly declared to be illegal can fix a tariff. It is illegal conduct made expressly illegal by the Antitrust statutes as well as the Shipping Act.

Mr. Turk: I think what has been said makes it clear that the claim is for concerted action, whatever elevation of the rate may have resulted from concerted action.

It is our position, of course, that Section 15 is the substantive law and that Section 22 of the Shipping Act provides the remedy. Now, just because Section 22 does not provide for treble damages and lawyers' fees is, we submit, no basis for holding that the plaintiff is entitled to proceed under the Antitrust Laws. After all, if supersession means what it says, the theory is that Congress removed this segment of our industrial structure, these public servants, from antitrust and subjected them to an entirely different regulatory philosophy, and if it did provide a remedy of reparations for the injury suffered that was deliberate and it was deliberately different from the standard of damages [fol. 105] prescribed for commercial enterprises generally.

I think that to the extent there is talk of a difference between the prospective operation of an injunction and the retrospective operation of damages the interference with obedience to a coherent regulatory policy is equal. It is true that the injunction focuses our attention on the fact that the Court under antitrust may enjoin conduct which the Commission under Section 15 might well approve. But we of the industry are subject to equal pulling and hauling if we take the combined action which is conceivably approvable under Section 15 but for that action may be subjected to treble-damage suits under the Antitrust Laws we are again being compelled to serve two inconsistent masters if this type of suit is allowed to succeed.

I think that the representative of the Government may have more to say on that aspect of it, the degree to which the allowance of treble-damage suits under the Antitrust Laws would interfere with the Commission's activity.

Speaking for the industry, I think we would be equally saddled with two inconsistent philosophies of regulation if we are subject to regulation and, indeed, punishment by treble-damage suits under the Antitrust Laws and at the same time have to obey the dictates of the Shipping Act.

The Court: This is all on the assumption that these de- [fol. 106] fendants did not obey the provisions of the Shipping Act.

Mr. Turk: Yes. We are assuming, as I believe we must on a motion to dismiss, that what the Complaint says is so, but what we have done here has been done without approval.

The Court: Isn't that precisely what was done in Cunard?

Mr. Turk: It certainly was.

The Court: And Far East, and more specifically in the New York case.

Mr. Turk: Certainly. There is no question about it, that the same claim was made there, that because these agreements were not submitted and approved they are at large.

In the New York case the opinion I think is noteworthy because Judge Edelstein said that he is a little tempted by Mr. Justice Douglas' philosophy in his dissent in Far East but he said he felt he was precluded from following it because, after all, the majority said the other way around.

Mr. Ransom: I would like to comment briefly on the Great Northern situation of that case and what I understand Mr. Dunne is citing it for. It is my understanding that what he is saying that the Great Northern case says that the doctrine of primary jurisdiction or supersession does not apply if all you have is a simple issue of law which the Court can decide and you do not need to concern yourself with the expertise of the Commission and there is no problem, no [fol. 107] issue involved that has anything to do with this expertise.

Now, this, then, addresses itself to, really, what would the issues be in the event of a trial of the case; with what issues would the Court be concerned; would there be any issues which the Commission itself should first have a crack at and which you should take advantage of the fact that they are experts in the field; and that there should be a uniformity of regulation.

The Court: Are you saying that in this case this Court would have to necessarily determine whether or not these agreements referred to by Mr. Dunne were actually beyond the scope of any approval?

Mr. Ransom: Yes. Not for the purpose of determining the motion to dismiss but for the purpose of trial. It is that to which I would like to address myself briefly, if I may.

This is where Mr. Dunne says his case is simple; he has a simple overcharge case. This is where we say the case is most complex when it comes to the Complaint itself.

The Court: In other words, you deny that these agreements which he is complaining of were in fact unapproved or beyond the scope of any Commission's approval. Is that right?

Mr. Ransom: Yes, Your Honor. What our position would be, which is the position actually already taken by the parties in a proceeding now before the Federal Maritime Com- [fol. 108] mission, which Government counsel will no doubt speak of—what our position would be on the trial of this case is that the agreement which was approved— First, the Westbound Conference has an agreement to approve rates and, then, the Far East Conference, represented by Mr. Turk, they have a rate-making section 15 agreement. Then these two groups decided that they were naturally competitive to one another. The cargo coming from the East Coast to the Philippines was in competition with cargo from the West Coast to the Philippines and they developed almost a rate war between the groups.

In order, then, to stabilize that situation they formed the two groups of carriers and entered into another agreement, a third agreement, this joint agreement, which is not unusual in the steamship industry. That agreement was Agreement 8200 and was approved. That agreement by its very terms calls for subsequent meetings of the parties to make provision for the machinery for rate making.

Now, the position which the parties would take in the suit is that all they did, all of the activities which the Complaint alleges, were extracurricular, or outside of the agreement, were in fact actually approved by the agreement, or if not within the language, were implementations

of the agreement or were actions which do not need approval separately.

That is an issue, if Your Honor please, that has plagued the Federal Maritime Commission and its predecessors [fol. 109] since 1916. That is an issue which, just thumbing through the decisions this morning—I found eight cases in the Federal Maritime Commission and Federal Maritime Board decisions since 1955 on the question: when is it when parties have approved agreement that they are acting outside the agreement and when are they not. The Commission is attempting to determine uniform policy. This is the very type of issue for which the doctrine of primary jurisdiction was invented.

The Court: In other words, this joint agreement was approved.

Mr. Ransom: The joint agreement was approved.

The Court: Counsel apparently contends that the parties did something that was beyond the terms of it.

Mr. Ransom: Precisely.

The Court: It would seem, offhand, that if the Commission approved an agreement and the question came up as to whether or not actions of the parties were arguably within or without that agreement that the Commission should be the one to determine what it approved or did not approve. We will hear from Mr. Dunne on that.

Mr. Ransom: Exactly, Your Honor, and in just almost those words was Judge Pope's decision on March 6, just this March 6, 1963, on a case which did not involve the matter of primary jurisdiction. It is the Transpacific Freight [fol. 110] Conference of Japan against Federal Maritime Commission.

The Court: Transpacific Freight Conference of Japan against—

Mr. Ransom: Against Federal Maritime Commission.

The Court: Is that in the brief?

Mr. Ransom: Yes, it is, Your Honor. It is an unpublished decision and it is in the reply brief.

The Court: To what point?

Mr. Ransom: To the point—

The Court: Don't read the case. Tell me what the point of it is.

Mr. Ransom: The point I wish to make from this case is that involved in that case was a question of the construction of an agreement between carriers, an agreement which had been approved, and the Commission had determined what it thought, how far it thought that agreement would go, whether the action was within or without.

The Court in that case said that the Board itself or the Commission itself is the one that approved it and the Commission is the one, therefore, that ought to be able to have the opportunity to decide what it says. And it says that if the Commission does not have this discretion and power, it simply does not have the power to carry out the policies of the Act.

I state that case because it is exactly what Your Honor [fol. 111] has said, and that is our position, that this is not simple; this case involves many complicated issues.

Just one other issue that it does involve. The agreement says that the parties shall file their action taken at these subsequent meetings. They filed the actions, they filed a record of their actions at the meetings.

The Court: Pursuant to the original agreement.

Mr. Ransom: Pursuant to the original agreement.

Now, query: Did they file correct statements? This is an issue of fact. Did they file what in fact took place at the meetings? Having filed it, what they did file, and the Commission having accepted it, did the Commission by that approve that action or not approve it? What is the effect of the Commission's action?

That is another issue which has been a matter of contention before this Commission for a great number of years. These matters are simply matters which the Commission is going to have to make and is trying to make uniform policy.

The Court: All right. Let's see.

Mr. Ransom: We have not heard from the Government yet.

The Court: Well, we have to hear from the Government.

ARGUMENT BY MR. HOOD ON BEHALF OF FEDERAL MARITIME COMMISSION

Mr. Hood: Your Honor, I think what Mr. Ransom, Mr. Turk and Mr. Dunne have all said really must have pretty well disposed of by this time that there is a reliance or [fol. 112] claim here of the statutes administered by the Commission. It is under 24B that we have moved for leave to intervene. The limit of our intervention is this motion to dismiss that we filed simultaneously with our petition for leave to intervene.

Also, Mr. Ransom and Mr. Turk have pretty well covered the field on the exclusive remedies of the Shipping Act. Therefore, my remarks must be brief.

First, I should like to point out, again, Your Honor, that Section 15 contains provision for penalites against persons who violate it. Those penalties are $1,000 a day; that Section 22 of the Shipping Act furnishes a procedure whereby a party injured by any violation of the Act can come to the Commission, file the Complaint, and following trial receive damages if such is approved.

Therefore, the Shipping Act unlike many regulatory statutes, does provide full relief both for the Government by way of injunction, as has been shown in Cunard and Far East, both by the way of monetary penalties collectible by the Government, as in the case of antitrust statutes, and, lastly, in the sense of damages collectible by persons who are injured by any violation of the statutes.

Perhaps I should point out, Your Honor, that as a representative of the Commission I am not here suggesting at all that the two defendants should be turned loose. It is our belief that they should be brought before the Commis- [fol. 113] sion. The Commission has currently pending an investigation into the very behavior on a much broader scale than is alleged in the Complaint in this case.

As was mentioned a moment ago by Mr. Ransom, there exists currently a joint agreement between the two conferences. That agreement looks toward the establishment of rates and rules and regulations relating to rates for move-

ment of cargo from both the East Coast and the Pacific Coast to the Far East. There is contained in that agreement a clause that permits either of the conferences on a stated notice to take independent action if they feel their best interest demands that.

The proceeding that is currently before the Commission, Style Docket 872, was instituted to determine whether this agreement was a full and complete agreement between these conferences; are they carrying out something in addition to what they have received Commission approval for.

An additional issue in that proceeding is whether the Commission should continue its approval of that agreement.

The Court: Should what?

Mr. Hood: Continue its approval of that agreement. If at any time the Commission finds an agreement that has already been approved by it which is detrimental to the commerce or being carried out in a fashion that does not comport with the statutes the Commission may cancel the agreement or it may modify the agreement. So that also [fol. 114] becomes a part of Docket 872 before the Commission.

That leaves us in this position: The Commission must ultimately decide what the limit of the behavior is permitted by Agreement 8200. That case is currently pending the Examiner's decision. Following the Examiner's decision, the parties to that case, which includes Carnation, will be given an opportunity to file exceptions, and then the Commission must ultimately issue its decision.

The Court: When they decide, who reviews that?

Mr. Hood: That is reviewable by the United States Court of Appeals under the reviewable act of 1950.

So, again, we are not here asserting that the Commission is only capable of construing the Act but what we are saying is that in order that the Commission be given first opportunity to do that that the trial of the matter under the Shipping Act should be before the Commission. Whatever the Commission does is going to be reviewable in court.

If the instant litigation is permitted to proceed here, we run the risk of the Court and the Commission running head-

on. It may happen and it may not. I don't know. None of us can know. The Commission may construe the agreement in one fashion and the Court or a jury may take a different attitude. Therefore, if it is placed before the Commission, we will have what we believe to be a desirable uniformity.

Mr. Ransom mentioned the recent Ninth Circuit case [fol. 115] wherein the Court clearly indicated that the Commission is the proper form for the initial determination of what is permitted by an approved agreement.

In addition to that, I would cite to the Court a case that is also cited in our brief. That is Swift Company versus Federal Maritime Commission. In that instance the Commission overturned the construction placed upon the agreement by arbitrators. That was a Fifth Circuit Court case, and there the Court emphasized that the Commission has the duty to construe the agreement.

I believe, Your Honor, I have nothing further.

The Court: All right.

Do you want to close the matter up, Mr. Dunne?

Closing Argument by Mr. Dunne on Behalf of Plaintiff

Mr. Dunne: I do not know if I have everything quite in order here, but let me start with what was just said .

The suggestion was made here that if the Commission can proceed here, then there would be a desired uniformity. If the question is one of law, there will be uniformity when the Supreme Court of the United States determines that question of law. When this matter of uniformity has been suggested and the matter has been one of law, the Supreme Court has said if uniformity is desired, we can provide it. Those cases are cited in our brief, starting at page 24 and following.

The Court: What about this point in this case? It is [fol. 116] denied by the defendants that their actions were beyond the scope of an approval. As I understand it, they state that a so-called a third or joint agreement was ap-

proved by the Commission and it had some provisions in it which contemplated meetings between the parties and the filing of the reports thereof and that the parties met and did file reports thereof. Doesn't that present the type of question which the Commission would have to determine whether or not these meetings and what happened at these meetings would be within the purview of what they had approved, and, also, whether or not the Commission should continue this third joint agreement in effect or not?

Now, should I decide those questions?

Mr. Dunne: I will come to that, Your Honor. That is the reason I emphasized in our brief, quoted Mr. Justice Harlan's opinion in United States against Western Pacific, that each case must be taken on its own basis.

The reason I want the facts of this case squarely before Your Honor, the precise facts—and I do not say this unkindly and I do not say it in the sense of criticism—because this discussion this afternoon has developed somewhat informally—but I do not think Your Honor has been fairly informed as to what was approved and what was not approved, and I would like to call that very specifically to Your Honor's attention.

[fol. 117] The Court: I know. But is there an arguable point about it?

Mr. Dunne: No. Couldn't possibly be an arguable point, couldn't possibly be.

But if I may, I should like to pick up one or two of these other things. It was last suggested by counsel for the Commission that the Commission could review this first and could go over the facts and that if the Court acted they might come head-on. That is just exactly the reason I cited in our brief the very recent case of California against the Federal Power Commission. The Federal Power Commission had a matter before it which involved the same issue that is before the Court.

The question was who should go ahead first. Mr. Justice Douglas said the policy of the antitrust statutes has been entrusted to the Courts and the Courts are going to see that the policy of the antitrust statutes is vindicated; the Court

should not defer to the Commission but should decide the antitrust question.

Some of these recent cases have taken a lot of color out of the language of the earlier cases.

Now, going back a little, this Transpacific case that was recently decided by the Ninth Circuit has nothing to do with this here. It has an entirely different question of construction. It was a matter which was before the Commis- [fol. 118] sion. It does not have this question of primary jurisdiction or sole remedy in it at all. That is not involved.

Well, the other thing I called Your Honor's attention to is that counsel slipped from two things, from one to the other. They slip from arguing the primary jurisdiction doctrine and then they slip into sole remedy. There was a case on which— The Judge went so far to say that sole remedy was so far under the Shipping Act that the Government couldn't even prosecute criminally. That has been knocked in the head by the recent decision in January in the Panagra case. So what I am suggesting to Your Honor is that a lot of water has run over the dam since Cunard was decided and these are some things—

The Court: Which is the case that held the Government could not prosecute?

Mr. Dunne: Pan American World Airways against— I do not know whether it is against the CAB or not.

Mr. Ransom: It is cited in all the briefs, Your Honor.

The Court: All right.

Mr. Dunne: Just decided in January. Pan American World Airways against United States. I don't have the official citation.

The Court: That is all right. If it is in the briefs I will find it. That held that the Government could prosecute for—

[fol. 119] Mr. Dunne: It actually applies to the primary jurisdiction doctrine, and held that the Government could not proceed civilly. But the Court went way out of its way to point out that this was not in any way to restrict or to be taken as restricting the Department of Justice in proceeding criminally or in proceeding civilly in those areas

outside of what would be covered before the Commission. I do not undertake to quote, but the language is quoted in our brief.

Now, some remarks—before I get back to the question which I know is bothering Your Honor—it was said that Great Northern was not an antitrust case and the implication is, therefore, it has no bearing here. Well, if it does not have any bearing, why did Mr. Justice Sutherland in Cunard rest his decision on the language of Great Northern? The Supreme Court did not think Great Northern was so far away from the point involved in Cunard that it should not be cited; not only cited, but relied on it.

But there is more than that. There is a case that involved railroads in the antitrust statutes which is cited in our brief, and that is Georgia against the Pennsylvania Railroad, where it was held that where the conspiracy involved was beyond what the Interstate Commerce Commission could do the Courts could act, and the State of Georgia was permitted to maintain an action. Do not be misled by what is said in the briefs, quoting another case, because that case [fol. 120] would not be decided the same way today. It would not be in certain circumstances because since Georgia against Pennsylvania the Interstate Commerce Act—Section 5B I think it is, but I am not sure of it—has been amended to provide that combinations of rail carriers shall not violate the antitrust statutes if approved, which brings me to another point that was argued before you. I thought Mr. Turk was talking about that the industry was in a pathetic position if it was being tugged one way by the Commission and going to be tugged another way under the antitrust statutes.

Congress thought of that. Congress provided a very simple way so they would not be tugged in two directions. When they have an agreement, file it with the Commission and have it approved and the antitrust statutes have nothing to do with it.

The Court: Can't the Commission approve sort of an open agreement?

Mr. Dunne: Sure it could.

The Court: Calling for further action and reports.

Mr. Dunne: Yes, they could.

What has not been called to Your Honor's attention, we have pled this and we are not pleading in the dark because we had documentation when we drew this Complaint, documentation which, indeed, was developed in a proceeding which is now pending before the Commission. There was [fol. 121] this Agreement 8200—we have pleaded this in substance in our Complaint—entered into by the members of both the Pacific Westbound Conference and the Far East Conference. We had a copy of that agreement and we knew it had been submitted to the Commission, had been approved. This Complaint was drawn in the light of that approved agreement. That Agreement 8200 provided in Section 1 which, possibly, standing alone, might be subject to some question of interpretation although I think the question of construction which is a routine matter and a traditional matter of Courts, the Court can construe it as well as anybody else, that for a meeting of the members or the signatories of this Agreement 8200, it said:

> "The initial meeting shall make rules, not inconsistent with the provisions of this agreement, for the conduct of all meetings to be held hereunder, and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting."

Notice that, the machinery. Not for making the change itself, but for the machinery of making the change of any rates, rules and regulations adopted at the initial meeting [fol. 122] or at any subsequent meeting.

What they did, they went down and had their first meeting in Santa Barbara, the January following the approval of this meeting. Then they proceeded to enter into agreements and there were certain memoranda of those agreements which were known as Memoranda of Decisions.

Now, the substance of this matter, again, is pleaded. The agreements between these carriers were that they should set up a list of initiative items. Those items on the initiative list were items upon which either Conference, Pacific Westbound Conference or the Far East Conference, could act independently of the other in fixing rates, but that item as to rates not on the initiative list neither Conference should act without the concurrence of the other.

Now, let's test that. This is the thing that they tell Your Honor is necessary to go to a Commission and a body of experts and the Courts really don't know enough to decide. Testing that agreement, that was made at these meetings with the provision of Paragraph 2 of Agreement 8200.

I have read you the first part of it, from Paragraph 1, about the machinery for changing rates. This is Paragraph 2:

> "Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to [fol. 123] time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice."

So here was an express provision expressly reserved to each of these two Conferences; the right of independent action to fix its own rates without the concurrence of the other Conference.

Now, that is just exactly contrary, just exactly opposite to what was agreed when they sat down and met. When they sat down and met they agreed that they would not independently change any rates if they were not on the initiative list.

Now, what do we allege in this Complaint, and we will prove it by their own minutes and by their own telegrams. They first raised the rates. We do not even have to go to the original tariffs to find out what was done. There is no [fol. 124] question of construction. They first raised the rates some time before January 1, 1957 for Pacific Westbound Conference carriers—this was by joint action, by concurrence—effective May 1, 1957 by $2.50 a ton. Now, there is no question of construction of a tariff. They just simply increased by $2.50. It does not take any expertise for a Court to look at the two tariffs and to see that the one, the newer one, is $2.50 a ton more than the first one. Now, that is all the question of fact that is there. It is as simple as that.

But that is not all. In November plaintiff Carnation applied to the Pacific Westbound Conference to reduce the tariff by two and a half a ton to the old rate, the rate which Pacific Westbound alone had lawfully fixed in 1951 and before this Agreement 8200 was entered into. Under approval of Agreement 57, Pacific Westbound Conference had the right and duty to fix the tariff for its member, and that became a lawful tariff. It had done so and fixed the tariff on evaporated milk in 1951.

Then, the next step is the Agreement 8200 which was approved, but approved by the Commission with the reservation in Paragraph 2 of this right of independent action to either one of these two Conferences. So there was never any approval of any agreement which deprived either of these Conferences of the right of independent action. Never. [fol. 125] It does not claim to be; if there had been they could come in here and we would be out of court in two minutes. Then the rate is increased by this side agreement by two and a half a ton.

In November 1957, Carnation asked them to go back to the old rate, the 1951 rate, which was fixed by Pacific Westbound Conference by itself. Pacific Westbound Conference determined that that should be done, that the rate should be reduced by two and a half a ton. It then applied to

Far East Conference to concur, operating under the side agreement.

When Far East Conference would not concur because of the side agreement for concurrence, a Pacific Westbound Conference withdrew its request and the rate was not reduced.

Stating it definitely, under Paragraph 2 of Agreement 8200, approved by the Commission, Pacific Westbound Conference had the right on a maximum of 78 hours notice to reduce that rate by two and a half a ton, just exactly as it had determined to do. It did not exercise that right. It did not exercise it because of the side agreement, never filed with the Commission for approval and never approved by the Commission.

Now, that is how simple this case is.

And when you talk about construction of contracts and policy in the industry, and all the rest, with all due deference, Your Honor, to counsel on the other side, that is plain nonsense. The facts are just as simple as I have told to Your Honor. There isn't an administrative question in [fol. 126] this case. This is a simple question of charging two and a half a ton more than the only rate that was ever lawfully fixed, which was the 1951 rate fixed by the Pacific Westbound Conference. That is why I say this is an overcharge case, because the increase of two and a half a ton was by reason of the side and unapproved agreement.

The refusal to reduce it on the request of Carnation and Pacific Westbound Conference, Pacific Westbound Conference requested concurrence of Far East Conference and it was refused, it was because of an illegal side agreement.

One of the things that Georgia against Pennsylvania Railroad Company held was that an agreement giving someone a veto power over the change of rates is an illegal agreement in violation of the antitrust statutes. That is exactly what happened in this case, and it is just as simple as that. That is the reason we say there is no administrative question here.

May I say just one other thing. There has been a good deal of talk about primary jurisdiction and then sliding

off to other matters. The only case that I know of—there is certainly no United States Supreme Court case on this—decided before the Isbrandtsen is the American Association case that was referred to Your Honor.

That was a case decided by the District Court, Southern District of New York.

The Court: Is this the 1954 case that they referred a [fol. 127] matter of law, is illegal per se, it is playfulness—that is the word he used—it is playfulness to apply the Far East Doctrine and the Cunard doctrine and make parties go to a Commission on a question that the Court itself is going to decide as a matter of law.

We suggest to Your Honor that when you have time to read the Complaint more carefully you will find that the only question, possible question of fact—and I am sure there is an Answer filed, there never will be a denial—is whether our statement in the Complaint here that the side agreement requiring concurrence was not approved. There cannot be the slightest doubt about the side agreement.

Counsel have gone outside of the Complaint and presented to Your Honor other matter. If there had been approval by the Commission of that side agreement it would be staring us in the face now. There is no such approval.

The only other question, then, is a pure question of law when Paragraph 2 of Agreement 8200 reserved to each of the two Conferences the right of independent action on 48 hours telegraph notice or 78 hours air mail notice that they were going to change rates, and that was not lived up to and was not adhered to because there was a side agreement that neither Conference would change its rates without the concurrence of the other. You have got the simplest kind of an antitrust issue. The Courts have been traditionally [fol. 128] handling this before there was any such thing as a Shipping Act or Commission. This is the importance of the McLean Trucking case, which is cited in our brief, along with Mr. Chief Justice Warren's opinion in U.S. against RCA, plus the fact that Commissions are not competent, are not competent, are not given the power to determine

antitrust issues as such. There is no case that I know of to the contrary.

They can exempt from the antitrust statutes under Section 15 of the Shipping Act if you proceed the way Congress said you are going to proceed. But there is nothing to permit the Commission to entertain antitrust issues as such.

I suggest that has been argued to you here today from beginning to end. Congress has said you can exempt, except, from the antitrust statutes by going to the Commission and getting approval of your agreement. Counsel on the other side are arguing to Your Honor exactly the same result follows even if you do not go to a Commission and get approval.

COLLOQUY

Mr. Ransom: You have been very patient, but could I take just one more second.

The Court: Yes, we can close this up. I will examine these briefs and issues in the case a little bit more closely and if I can rule on it, all right, and if I cannot I will ask for the parties to answer the question.

Mr. Ransom: I merely want to comment that I think Mr. Dunne has done a very good job of proving the point that [fol. 129] I had in mind in his long recital about how simple it is . I think it was quite difficult to follow and I think it shows it is quite complex.

Secondly, the latest expression of the Supreme Court on the whole subject is the Panagra case decided on January 14, 1963. That case, which applied the doctrine of primary jurisdiction to dismiss and sent back to the CAB a matter which had already gotten to the Supreme Court and which the CAB, in the first place, did not want, that reaffirmed as good, solid law the Cunard and the Far East by saying dismissal of antitrust suits where administrative remedy has suspended a judicial one is the usual course; see United States Navigation against Cunard SS Co., Far East Conference against United States. We, Your Honor, still stand on Far East, Cunard, and AUT.

Mr. Hood: The Georgia versus Pennsylvania case referred to by Mr. Dunne, did say that as to railroads there was some scope of antitrust principle. What he fails to mention is that the State of Georgia brought a Complaint seeking two remedies; one, treble damages under the Antitrust Laws and, two, an injunction. On the authority of the Teal case, the Supreme Court held that it was not entitled to maintain the treble-damage suit, but because the railroads, not protected by any I.C.C. approval at large under the Sherman Act, they allowed the injunction proceeding to stand.

[fol. 130] The Court: All right, gentlemen. Thank you very much.

I shall look into it a little further and if I can rule on it I will. If I can't, I will ask for help.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 131] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

ORDER GRANTING MOTION OF FEDERAL MARITIME COMMISSION TO INTERVENE—April 30, 1963

The Court, having reviewed the record and the briefs, desires further argument.

Mainly, the Court wishes to direct counsel's attention to the question, not heretofore raised or argued, whether the Shipping Act, 46 U.S.C. Sec. 821 (the remedy-reparation section) can be read as providing a remedy to plaintiff herein, bearing in mind that the only violation of the Shipping Act charged herein is the carrying out of an agreement prior to its approval by the Commission, and bearing in mind, further, that Section 821 provides reparation only for such injury, if any, as is *caused* by a violation of the Act. Can the particular violation here charged be considered the *cause* of any loss to plaintiff? Did plaintiff pay any more as a result of this violation than it would have paid if the violation had not occurred, i.e., if the rate change [fol. 132] agreement had been approved before being carried out? Was not the legal cause of any recoverable loss the violation of the Anti-Trust Act rather than the violation of the Shipping Act?

Counsel will arrange a hearing time with the Clerk. If not possible, the Court will fix a time.

The motion of the Federal Maritime Commission to intervene as a defendant under F.R.C.P. 24(b) is granted.

So Ordered.

Dated: April 30, 1963.

W. T. Sweigert, United States District Judge.

[fol. 133] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Before: Hon. William T. Sweigert, Judge.

Civil No. 41,153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, et al., Defendants.

Transcript of Further Hearing on Motion to Dismiss —June 11, 1963

[fol. 134]

APPEARANCES:

For the Plaintiff:

Messrs. Dunne, Bledsoe, Smith, Phelph, Catheart & Johnson, 315 Montgomery Street, San Francisco, California, By: Arthur B. Dunne, Esquire, and James R. Baird, Jr., Esquire.

For the Defendant Westbound Conference and defendant carriers in that Conference:

Messrs. Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco, California, By: Edward D. Ransom, Esquire, and William H. King, Esquire.

For the Defendant Far East Conference:

Elkan Turk, Jr., Esquire, 120 Broadway, New York 5, N. Y.

For the Defendant-Intervenor Federal Maritime Commission:

Robert B. Hood, Jr., Esquire, Federal Maritime Commission, Washington, D. C.

[fol. 135]

Tuesday, June 11, 1963
2:00 o'clock p.m.

The Clerk: Civil Action 41,153, Carnation Company versus Pacific Westbound Conference for further hearing on motion to dismiss.

STATEMENT BY THE COURT

The Court: Counsel, in this matter, as you recall, I sent out a memoranda, and subsequent to that memoranda, I have received further memoranda here from plaintiff and from, I think, all of the defendants, including the intervenor, Federal Maritime Commission.

Now, I have gone over those memoranda received subsequent to my notice in order to get the general purport of them. I have examined them carefully. I did examine all of the original briefs, and I did examine most of the important cases relied on by the various parties, and I proceeded to try and put the matter together to my own satisfaction, and it was then that I came to more or less of a standstill concerning an examination of the so-called Reparations Section of the Act.

I read that section carefully in the light of the three named Supreme Court cases, and then, because the particular matter that was bothering me had not been discussed at any length by counsel, I thought the best thing to do was to advise you of my problems so that you could have a hand in it. I didn't want to proceed on that basis without hearing from you.

[fol. 136] However, I don't expect you to reargue the whole case at this time by any means. I have gone over it pretty thoroughly. However, I do want to have your reac-

tion as briefly as you can give it to me in connection with the point that I asked for help upon.

Now, the Complaint here alleges that this agreement concerning change of tariff was not within the terms of the previously approved joint agreement 8200. Under this Complaint, as far as the Shipping Act is concerned, no alleged unjust or unfair method of practice discriminatory against others, as provided by Sections 815 and 816 is alleged, nor does it appear from the Complaint that there was any violation of the Shipping Act inherent in the agreement itself.

Under the Act, the defendants, as conference members, have the right to make such an agreement. The Act simply provides that it would be unlawful for the defendants to carry out that agreement prior to the approval by the Commission.

Further, under the Act, Section 814, the Commission was required to approve such an agreement and prevent undue discrimination or unfairness to others.

As far as the Shipping Act is concerned, the only unlawful act alleged against the defendants herein is the carrying out of the rate change agreement prior to its filing with and approval by the Federal Maritime Commission, as required by Section 814. For such a violation of [fol. 137] Section 814, the Act itself provides a specific penalty against the carrier of $1,000 for each day such violation continues, the penalty to be recovered by the United States in a civil action.

The question now arises whether Section 821, providing that any person may file with the Commission a complaint setting forth any violation of the Shipping Act and ask reparation for the injury, if any, caused thereby was available to plaintiff herein.

It will be noted that Cunard, noting the allegations there charging "a discriminatory dual-rate system constituted a direct and basic violation of the Shipping Act," and the Court went on to hold that a "remedy was afforded by the Shipping Act, Section 821, which," said the Court, "to that

extent supersedes the Antitrust Laws," and further that, "Mere failure to file the agreement there in question would not be ground for antitrust action, which depends upon the right to seek a remedy under Antitrust Law," a right, which we have seen, does not here exist, since the only alleged violation of the Shipping Act in the case at bar is the failure of the defendants to file and gain approval of the rate change agreement prior to carrying it out, and since Section 821 provides reparation only for such injury, if any, as is "caused by the particular violation," the further question arises whether the plaintiff herein could show that such particular violation was the cause of any loss of damage, to-wit, [fol. 138] not merely that it might have caused damage to him, but did not, but that by its very nature it couldn't have caused damage to him.

Certainly, the failure of the defendants to file or gain approval of the rate change agreement before carrying it out was not of itself a cause of loss to the plaintiff. The agreement between the Conference members concerning tariffs, as I read the cases, was not illegal itself under the Shipping Act, and as far as absence of Commission approval is concerned, plaintiff would have paid for shipping evaporated milk under the increased rate if approved by the Commission, exactly the same amount it claims to have paid under alleged unapproved rate change agreement.

It would seem that any recoverable expense or loss to the plaintiff here was caused not by the particular violation of Section 814 of the Shipping Act, but by a violation of the antitrust action, making any combination to fix or maintain prices or rates illegal, and giving in such case the right of action for damages.

Such an agreement between the Conference members, not having been filed with or approved by the Commission would not, and this is purely tentative for the purpose of provoking discussion, would apparently not be exempted from the antitrust action under Section 815 of the Shipping Act.

Cunard, as we read the case, did not hold that all agree- [fol. 139] ments between Conference members, whether filed

or approved or not were excepted from the provisions of the Antitrust Acts. It simply held that the Antitrust Acts were superseded to the extent that the Shipping Act provided a remedy for violations of the Act, or charges so related, with such violations to be, in effect, a component part of them.

Well, that's enough to indicate the particular question that I wanted to ask you to discuss, and you can proceed in your own way. My mind is completely open on this case. I intend to keep it so until I hear the matter.

We can hear either from the plaintiff, it seems to me, as to his reaction to whether he thinks that it has any merit or hasn't any merit. Then I'd like to hear from the Federal Maritime Commission intervenor to see what they think of it.

The statement that I made before, namely, that I don't expect you to reargue this case. In fact, I would suggest that you not do it. I will read carefully anything that you filed with me subsequent to the Notice sent out, but I'm rather intrigued with this point, and I'd like to see what the reaction is.

STATEMENT BY MR. DUNNE ON BEHALF OF PLAINTIFF

Mr. Dunne: Let me say this first, Your Honor: I know of no direct authority that answers the question which Your Honor put, but in looking over the cases which have been cited in the memoranda on the other side—I won't say this [fol. 140] of all of the cases—but in the cases, particularly in the memorandum on behalf of the Pacific Westbound Conference, in two of them in particular to which Mr. Ransom called attention, the Swift case and the Kemper case, Mr. Ransom in his memorandum at page 11, line 21 very frankly concedes that those cases are not strictly in point, and very frankly concedes there something upon which Your Honor put his finger, and that was that in that case, not only was the agreement between the Conference members not approved, but in the action which was taken, there was an independent violation of the Shipping Act itself.

That is the character of the conduct, apart from the fact that there was a non-approved agreement, which constituted violations of the statute.

Now, I think you will find that the Smith—Muir-Smith case, which is also referred to, if you will look at it—

The Court: M-u-i-r?

Mr. Dunne: M-u-i-r hyphen Smith; which is cited in their memorandum, is a substantially different case, because there again there was a violation of an independent provision of the Shipping Act.

Now, in reading that case, Your Honor must bear in mind that that was an interstate shipment. Interstate shipments were involved and not foreign. And the provisions of the Shipping Act are somewhat different as to interstate business and as to foreign business.

[fol. 141] And there the violation was in charging a rate which was higher than the public rate. Again, a case of an independent violation.

Now, considerable time was spent in the memoranda on the American Union Transport case, and I think that case—

The Court: That's the New York case?

Mr. Dunne: That's the New York case. Against River Plate.

And again in the memorandum for Pacific Westbound Conference the matter is spelled out. The memoranda has given the full story of what happened in that case.

Now, the opinion of the District Court in that case indicated that there was something more involved in that case that a mere agreement among the carriers not to pay brokerage which was unapproved; and it indicated that there might then be involved in that case some application or interpretation of regulations of the Commission—whether it was the Commission or one of its predecessors, I refer to it as the Commission—aside from the agreement not to pay brokerage.

The matter was fully developed, and the plaintiff in that case then proceeded before the Commission. But then it was fully developed in the hearings that the profession of brokers, insofar as it affected foreign commerce in the cir-

cumstances of that case, was a business which was regulated, and under the regulations which applied to this regu-
[fol. 142] lated business of brokerage, it was ultimately determined as a matter of application of those regulations, that the broker in no event was entitled to any brokerage.

What the cases—

And of course, if he was entitled in no event to anything, then it wouldn't have made any violation of the Antitrust Statute. Any different violation of the Shipping Act would be a matter of no consequence.

In somewhat reverse, I think that has some application to the questions that Your Honor put.

Now, let me go back a little. Your Honor, I have some notes here, but I want to be very careful to follow Your Honor's suggestion and not argue other aspects of the case, but address myself solely to the matter which Your Honor has called to our attention.

Notice this, and I don't say that this is conclusive of what Your Honor's determination should be, but the Commission itself takes a very peculiar position here. The facts that we are now discussing, the basis upon which this case is now being discussed before Your Honor on a motion to dismiss, are undisputed facts. There is no question of fact as to what did or did not happen. The Commission says, "Oh, well, we want to try this," but the Commission will not avow whether or not those undisputed facts constitute matters upon which, if they had been before the Commission, we would be entitled to reparations.

[fol. 143] The Far East Conference, it seems to me, is taking exactly the same position. They are saying, "If you get before the Commission, we are going to deny certain of these averments."

The Court: Well, this is a motion to dismiss your Complaint.

Mr. Dunne: Exactly.

The Court: It will have to be determined on the undisputed facts.

Mr. Dunne: On the undisputed facts, exactly, Your Honor.

And yet, we can't get an avow out of the Far East Conference that on these undisputed facts, we would have a remedy before the Commission.

So far as the Pacific Westbound Conference memorandum is concerned, they at some point indicated that perhaps we would have a remedy, but in the latter part of the memorandum they leave themselves an escape hatch on that, and again will not commit themselves.

But I think that that memorandum makes a very interesting attempt to characterize our case. It is suggested in that memorandum that we're really not complaining because this agreement is not approved, but we're really complaining that the rate that was charged was unreasonable.

Now, it seems to me—

[fol. 144] The Court: I didn't understand that to be the complaint, that the rate was unreasonable.

Mr. Dunne: Nor do I, Your Honor.

The Court: I think that the complaint is just a complaint that there was a combination to fix prices, and that it was not exempt from the Antitrust Laws.

Mr. Dunne: That's right, and that's all we claim.

The Court: If there were an issue here as to whether or not the rate fixed was reasonable or not, I suppose then remedy would be initially commissioned.

Mr. Dunne: Might very well be. And I would suppose as to interstate commerce, although I haven't gone into this and wouldn't want to commit myself, but as to interstate watergoing traffic, that might very well be the situation.

But what this does, though, suggests to us a hint of what the position would be if this matter were before the Commission. The position there would be that whatever the test may be under the Antitrust Statutes as to the fact of damage, and whatever the test under the Antitrust Statutes may be as to the extent of damage, under the Shipping Acts something more must be shown. It is not enough to show that there was an unfiled or filed and unapproved agreement, but it may very well be argued, and it might very well be the position that would be taken, that so far as the Shipping Act is concerned, something else must be shown

because as Your Honor pointed out, it well may be that [fol. 145] approved or unapproved, whether the parties had made this agreement or hadn't made this agreement, the rate would have been exactly the same; or as Mr. Ransom has pointed out, we would be out just as much money absent this unapproved agreement.

Now, we've got to get ourselves in a position where there is something illegal, so that we're not only out the money, in fact, have lost that amount of money, but it has become a recoverable loss.

Now, our position there is perfectly simple. It would be recoverable loss under the provisions of the Antitrust Statute, because the making of this agreement under the Antitrust Statutes is the violation.

The conspiracy—

The Court: And the statute gives the right to recover damages.

Mr. Dunne: And treble damages, too.

The Court: Well, treble damages, also.

Mr. Dunne: Now, in our memorandum, we pointed that out, but this is a separate matter, this question of whether or not there is an adequate remedy, if there is any remedy under the Shipping Act.

The Court: I'm not asking whether there's an adequate remedy, I'm asking whether within the meaning of that section, the so-called remedy or Reparations Section, there is [fol. 146] any remedy at all on the facts which you allege in your Complaint.

Mr. Dunne: Put it this way: If it can be said that we have been hurt by what the other side has characterized as—

The Court: You may have been hurt, but was your hurt caused by the violation of the Shipping Act? That's what I'm getting at.

Mr. Dunne: A purely technical violation of the Shipping Act. Is that the thing that gave us a recoverable position under the Shipping Act?

Now, counsel on the other side said this, and this may bear upon what Your Honor has in mind, they have said, with which we disagree, that it is enough if there is some remedy

in some circumstances under the Shipping Act. If there is, that it is not a matter of any consequence that if we got before the Commission we might not be able to prove our case.

The Court: Well, now, wait a minute. Stop right there. As far as that is concerned, I agree that there may be remedies provided under the statute. The man could show a violation, but in his particular case, his loss was either nominal or non-existent. But what I am talking about is this: If you bear in mind that the violation here, the only violation alleged here that I can find so far, is the violation of the statute, in re the failure to obtain commission approval be- [fol. 147] fore carrying out an agreement between them, which they could have made.

Mr. Dunne: That's right.

The Court: And which presumably would have been approved, so far as I can see.

Now, the question is, on that type of a violation, by its very nature, could there ever be a conceivable case in which that would cause damage to a person who pays the rate?

Mr. Dunne: Well, now, if—

The Court: And it's not a question of whether in one case you suffer damage, great or less damage by reason of some violation of an act, it is a question as to whether or not it's conceivable, having in mind the nature of this violation, that it could have caused the damage, as distinct from a cause of damage by reason of the statutory provisions of the Antitrust Act.

Mr. Dunne: But if Your Honor will let me finish my thought in that, they have suggested that if there is a remedy in some circumstances, then whether we can prove, bring ourselves within the remedy under that Act and prove our case, if we're proceeding under the Shipping Act and before the Commission, that's a matter of no consequence.

Now, what I say is this: But if proceeding under that Act, there are requirements for making a case under that Act, which we could not meet, which place upon us an addi- [fol. 148] tional burden which we would not have under the Antitrust Act, then we do not have under that statute the

superseding remedy, which I think is another way of saying what Your Honor has said.

Again, starting off on another tangent, let us suppose this sort of case: The United States Supreme Court against Pennsylvania Railroad Company pointed out that a combination of fixed prices, fixed tariffs was a violation of the Antitrust Statute. Even though it provided only for a veto, a prevention in the changing of rates, you would have a violation of Antitrust Statutes.

Now, let's assume that same set of facts, and I think that is what Your Honor has in mind. Let us assume that a rate had been fixed for carriage between the West Coast of the United States and the Philippines before the unapproved agreement had been made. The unapproved agreement was then made. The unapproved agreement put into the hands of the Far East Conference a veto power, upon the power of the Pacific Westbound Conference to change that rate. That agreement was not approved, but we continued to pay that rate. Could it be claimed that we had suffered damage by reason of a violation of the Shipping Act?

And I think Your Honor put your finger on it. We could not. The rate would be exactly the same.

In other words, I think, while nobody will expressly avow it, but so far as the actual cases are concerned, they have [fol. 149] shown something more than the unapproved agreement; they have shown something else that was a violation of the Act.

Now, unless we undertake the burden of showing something more than the making of an agreement, which was not approved as required by Section 15 of the Act, we haven't shown any damage by reason of the violation of the Act, and in order to do that, we would have to assume a burden, which is not put upon us under the Antitrust Statutes.

Now, I think that confining myself only strictly to the question which Your Honor put, and not getting into other cases of this matter which have been fully discussed elsewhere, the equivalence of remedy and the rest of it, that that is about as much light as I can shed on this matter at the moment for Your Honor, because I don't know of any authority on the subject that is of any assistance to us.

STATEMENT BY MR. HOOD ON BEHALF OF FEDERAL MARITIME COMMISSION

Mr. Hood: Robert B. Hood, Jr., for the Federal Maritime Commission.

Your Honor, Mr. Dunne has characterized the Commission's position as very, very peculiar. I believe he states that the facts here are not in dispute, therefore the Commission should rush forward with its interpretation of the law.

We have failed to do that, and I believe we are proper in our failure to do that simply because that we believe that a part of every man's day in court is the right to argue the [fol. 150] law. If this case ends up before the Commission, as we believe it should, then the Commission is going to be faced with arguments on both sides of this question.

Turning now to one of the matters that Your Honor mentioned in his opening remarks, and that is that there was no violation of the Shipping Act in the agreement itself, that is, other than the non-approval of the agreement, I believe you indicated that—

The Court: I said that the only violation which appeared on the face of the Complaint was that the Shipping Act was violated by putting it into effect before it had been approved.

Mr. Hood: Yes, sir.

Well, if I may turn then merely to the question that is stated in the order for further argument—

The Court: Pardon me. You may have all kinds of things that you can show by way of defense, that the situation was other than it appears to be, but for the time being, this motion is directed against his complaint, and I am asked to dismiss it solely on the ground of primary jurisdiction and I have to rule on the complaint for the present, anyway.

Mr. Hood: Yes, Your Honor. I'm not here to defend or prosecute anyone.

The Court: Correct.

Mr. Hood: I believe, Your Honor, that the question that [fol. 151] you have posed for reargument does contain a suggestion that the agreement would be approvable under the Shipping Act.

The Court: Well, I thought that under the provisions of the Act—I put it in here. You can correct me, because you are a specialist and I don't know much about this Act.

I think I said that under the Shipping Act it is required that the Commission approve agreements in the absence of something in connection with those agreements that establishes a discrimination or an unfairness to others.

Mr. Hood: Or detrimental to commerce, sir, is one of the other—

The Court: Well, there is a general clause tagged onto the end of it, something about commerce in general.

Mr. Hood: Yes, sir.

The Court: Well, all right. Go ahead.

Mr. Hood: The phrase "detriment to commerce" has been further amplified for Your Honor's information by the additional of "contrary to public interest" in a recent amendment. The Commission has stated in decisions since the recent amendment that "detriment to commerce" has always been construed to mean "contrary to public interest," that the two phrases mean substantially the same thing.

The Court: Well, all right. Go ahead.

Mr. Hood: What I wanted to point out to Your Honor is that under the language of Section 15 it is not necessary [fol. 152] that you show some violation of some other provision of the Act in order for the agreement to be unapprovable. There are other things that may cause an agreement to be unapprovable. We cannot, I believe, answer the question of whether this agreement would have been approved by the Commission or not here.

The Court: Well, what would be your thought on this matter—this Section—is it 814, the Reparations—?

Mr. Hood: That's the code section. 814 is Section 15, sir.

The Court: Yes.

Mr. Hood: 821 is Section 22, which is Reparations.

Perhaps I can state what I am driving at in a highly different fashion, sir.

The Cunard case and the Far East Conference both involve Section 15 agreements, so-called.

The Court in each instance indicated that it could not decide the approvability of those agreements.

The Court: That's right.

Mr. Hood: That was a matter that must first be decided by the Commission.

The Court: Well, I can understand those cases.

Mr. Hood: Ultimately in Isbrandtsen it was determined that the kind of agreement under review in Cunard and Far East was unlawful, but that decision or that determination [fol. 153] was made by the Court only after the agency itself had spoken.

The Court: Yes. I haven't had any particular difficulties with the Cunard case and so forth.

Mr. Hood: Well, Your Honor, with those questions arising in this case, as they must—

The Court: Why would those questions arise in this case as far as this complaint is concerned at the present time?

Mr. Hood: Well, if we are to assume that the agreement was approvable or was not approvable—

The Court: Well, suppose it was not approvable. Would that make any difference insofar as my question is concerned?

Mr. Hood: Whether the assumption must be made one way or the other makes the difference, Your Honor.

The Court: Make it either way, and then discuss it from either point of view. Suppose that we assume that this agreement need not necessarily have been approved, it might have been disapproved, then would that shed any light on the question that I am asking, which is, namely, whether under a statute which says that a man can go to the Commission to get reparations for any damages caused by a violation of the Act—

Mr. Hood: Yes, sir.

The Court: —could he in any case where all he had was the carrying into effect of an agreement prior to approval, could he in any event show damage caused by the violation [fol. 154] of the Act? That's what I'm trying to get light on.

Mr. Hood: Yes, sir.

The Court: Under any circumstances, just limiting it to that question for the present.

Mr. Hood: An unapproved behavior under an unapproved Section 15 agreement may be violative—

The Court: All the man has is the fact that these companies charged him a rate which had been fixed but not approved by the Commission.

Now, it seemed to me that any loss that he might claim couldn't be deemed to have been caused by a violation of the act, because the condition of the man in the last instance would have been the same as the condition of the man in the first, because if it had been approved he would have paid $2.00 a ton; if it hadn't been approved he paid $2.00 a ton.

Mr. Hood: Your Honor—

The Court: So he paid just as much one way or the other, and how could he then argue that he had been caused any loss caused by a violation of the Act? He might have claimed some loss on some other theory or some other basis, but how could he claim that his loss was caused by a violation of the Act?

Mr. Hood: Your Honor, that's again the question that we submit the Commission must determine first.

[fol. 155] The Court: Why? What is there to determine?

Mr. Hood: The construction of the Shipping Act.

The Court: That's a question of law.

Mr. Hood: Yes, sir.

The Court: Do they have to construe the law, too?

Mr. Hood: Ultimately in the Isbrandtsen-Supreme Court case, sir—

The Court: I never understood that absent some inextricable connection between the law and the fact, that the Commissions were to determine the law in the first instance. I think that primary jurisdiction is rested on the ground that they have very peculiar questions of fact and questions of quasi-factual judgment to make. But I never understood that it was purely a question of law that you would have to go to the Commission.

Mr. Hood: I would agree with Your Honor in that state-

ment, and I believe lawyers generally find themselves, or should find themselves capable of having an opinion as—

The Court: Well, whether they are or not, the theory is that the Court can decide it. It may decide them wrong, but in theory decides it right.

That's the only thing I'd like to find out from you. You're familiar with this Act. You're a specialist in it. How could this plaintiff here step into the Commission and say, "Here, I want reparations for a loss which has been caused by a [fol. 156] violation of this Act." So they say, "What violation?" And the only one he could point to, so far as his Complaint shows at the present time, is that these Conference members put into effect a rate which he paid, but they hadn't had it approved by the Commission. And how could he maintain that he had been caused loss by reason of violation of the Act, if that's all he had?

He may scream and say, "I've been caused loss by violation of the Antitrust Act," and a lot of other things, but how could he say, "I've been caused loss as a result of the violation of that Shipping Act"? That's what I am trying to find out.

Mr. Hood: Your Honor, I suggest that what he might say is, "But for."

The Court: "But for" what?

Mr. Hood: "But for the carrying out of this agreement, I would have paid a lesser rate." Certainly a man can make that argument—

The Court: No, because that—

Mr. Hood: —if we are to assume that the Commission—that he would have paid the same rate as the Commission approved—

The Court: His loss here was carrying it out before getting—carrying it into effect before getting approval. Now he has to show that he—that his loss was traceable to [fol. 157] the violation.

Now, the response comes, let us say, from the Commission, but if it had been approved by the Commission the day it was made, you would have paid exactly the same, so where's your loss?

Mr. Hood: Yes, Your Honor, but—

The Court: Maybe you have a point there. I'm not minimizing that.

Your answer is that his loss is caused by the violation because these people carried it out. They put it into effect without approval, and that in that sense it's being caused by the violation of the Act.

Mr. Hood: Your Honor, Section 15 does not merely prescribe the carrying out of agreements. The section requires agreements be immediately filed with the Commission, and the penalty provision of the section states that, "In a violation of any provision of this section, the penalty shall be" such and such. There is specific language. It says it's unlawful to carry out an unapproved agreement, but that's not the only thing that's unlawful under Section 15.

The Court: I seem to sense here that the answer may be that here is a man that's paying a dollar a ton. Now, they suddenly put in a rate of $2.00 a ton on him, and he pays it, but it's not approved by the Commission. It's carried out before approval of the Commission.

[fol. 158] Is it your judgment that he would have been caused loss due to the violation of the Act, let us say, to the extent of the increase?

Mr. Hood: Your Honor, perhaps I should apologize. I cannot answer except as spokesman for the Commission, and I cannot judge that because the Commission may find itself in a position of having to judge it, based upon the argument made to it—

The Court: Well, that's all right. That's all right.

Mr. Hood: I'm very sorry, but it makes it a little cumbersome to speak.

The Court: That's all right.

Mr. Hood: Your Honor, we continue to urge that it is unnecessary to reach this question here, that the other cases have avoided this. They have taken the language of the statute at face value, if you will, and have determined that it's a comprehensive measure for the regulation of the industry, and that a question such as this should be initially determined by the Commission.

We suggested in our latest memorandum that if Your Honor disagrees with our urging on that point, that stay might be the proper solution here; that if there is any substantial question on that point, and if Your Honor feels that it must be resolved one way or the other before this suit can [fol. 159] be disposed of, it might be most prudent to hold this suit in advance pending some conclusion by the Commission.

The Court: All right.

STATEMENT OF MR. TURK ON BEHALF OF FAR EAST CONFERENCE

Mr. Turk: Elkan Turk, Jr., for the Far East Conference.

Your Honor, I think it is understandable that the Commission, being in the position of a potential judge, let's say, or another court, which may have to decide this case—

The Court: Well, you're not in that position.

Mr. Turk: I'm under no such disability. Of course, I'm under the disability of counsel who does not want to confess judgment for his clients either. But I think that we must concede this: I think there's been too little reference to actual language both of the Shipping Act and of the Complaint in this case, and I would beg your indulgence to refer to, let's call it the antepenultimate paragraph of Section 15, which starts—

The Court: Could you give me the other section?

Mr. Turk: Section 814 of the Code.

The Court: Give me the Code Section. That is the only thing I want.

Mr. Turk: It is Section 814 of the Code, the fourth paragraph, starting "All agreements"—

The Court: I haven't got it here right now.

Mr. Turk: Well, if I read it, perhaps—

[fol. 160] The Court: You just read it.

Mr. Turk: I think you have probably read it enough already so the language is familiar, but I think it is necessary to pin it to what this question of yours does present to us here.

"All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval, or after disapproval, it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation."

Now, we submit that Section 15 creates three types of unlawfulness.

First, there's the command to file immediately;

Secondly, there is the requirement of approval; and

Thirdly, there's the injunction to party subject to this Act not to carry out agreements unless and until they are approved.

Now, it may be that if a group of carriers such as ours make an agreement and fail to file it, and just leave it lying there in the sun, they have subjected themselves to a penalty at the suit of the Government in a civil suit, to collect a thousand dollars a day, but they have not caused Carnation [fol. 161] Company or anybody else any injury.

But now, it seems to me, it is essential for us to bear that injunction not to carry out agreements prior to approval in mind in reading what the essential allegations of this Complaint are, and paragraph 22 thereof says:

"Before May, 1957, defendants acting as alleged in paragraph 18 above,"—

And paragraph 18 is that horrible conspiracy combination and secret plot,—

"agreed that the rates for transportation by water by members of defendant P.W.C. from Pacific Coast ports of the United States to the Philippine Islands for evaporated milk, should be increased by $2.50 per ton and that defendant P.W.C., pretending to act agreeably to the provisions of said Agreement No. 57, should state and circulate said increase as effective May 1, 1957."

That's its own agreement and not the joint agreement, "should state and circulate said increase as effective May 1, 1957."

And continuing in paragraph 23:

> "Before May 1, 1957, and effective as of May 1, 1957, P.W.C. did, in fact, so announce and circulate said in-
> [fol. 162] crease in said rates, and over plaintiff's protest defendants put into effect and applied said increased rates. In so doing defendants falsely pretended that P.W.C. was acting lawfully and agreeable to said Agreement No. 57. In truth and in fact, in so doing, defendants were acting agreeably and pursuant to said unlawful combination,"

et cetera.

I think there's no question here that there's no nice abstract problem of whether we just ignored some petty formality under Section 15 of filing and getting approval.

The Court: All you're reading from are allegations which are part and parcel of an antitrust action.

Mr. Turk: They are part and parcel of an antitrust action, but as I understand Your Honor's question, the question is whether the antitrust aspect is dispelled, superseded because of the Shipping Act, and it's essential in Your Honor's mind, as we understand the question, to determine whether those same allegations would entitle this plaintiff to relief under the Shipping Act.

The Court: The very question here is whether or not these companies are exempt or not exempt from antitrust.

Mr. Turk: That's right. And what I'm trying to do, Your
[fol. 163] Honor, is take this injunction of unlawfulness under Section 15—

The Court: The only thing he alleges in his Complaint that was unlawful under the Shipping Act is that they carried on the agreement without approval.

Mr. Turk: Yes.

The Court: All right.

Mr. Turk: I just wanted to make—

The Court: The rest of it is all antitrust.

Mr. Turk: I just wanted to make sure that it's understood that the gravamen of the Complaint is not some abstract question of a failure to file, which could have been rectified and therefore made no difference.

The Court: It's an antitrust complaint.

Mr. Turk: But it's also a Shipping Act complaint, because the Shipping Act covers the substance of this charge, the carrying out of an agreement which was not filed and not approved.

And now we come to the proposition which the defendants assert, that if Carnation can prove that these rates were increased, or that one group of the lines vetoed a decrease by the other, pursuant to an agreement which was unlawful, because it was not filed and approved, then Carnation could and has established a right to reparation under Section 22, Section 821 of the Code.

[fol. 164] The Court: What would be the conceivable damages they could have suffered?

It may be that this is the answer to the question that, as I put it a minute ago, if Conference members put a rate into effect of say a dollar a ton, and then they put a new rate into effect of two dollars a ton, but don't get permission, then the shipper can go to the Commission and tell a story in those terms, and say, "I want a dollar a ton back for the period of time during which they put the increase into effect without approval of the Commission."

Now, that may be the answer, but what I was intrigued with is the idea that in that situation, the dollar a ton increase could not be said to have been damage caused by the particular violation involved, because if it had been approved, he'd have made the same any way, and there may be some circular reason involved in it.

Mr. Turk: I believe there is because—

The Court: Well, I'm asking for you to pry it out.

Mr. Turk: All right. Let me suggest this to Your Honor: That when you assume approvability and say that therefore it would have been lawful, I think that you have to make a comparable assumption when you test the antitrust allega-

tion and assume no one unlawfulness under the Antitrust Laws.

The essence of unlawfulness here, whether the agreement [fol. 165] was susceptible of approval or not, is the fact that it was not approved, and whether it was—

The Court: If that's a violation, there's no doubt about it.

Mr. Turk: Yes. And once it's established that an agreement of the sort described in Section 15—and this is clearly that it is an agreement on rates—has been carried out without filing and approval, Section 15 unambiguously says that that is unlawful.

The Court: The case that I put to you, what would be the remedy of the shipper?

Mr. Turk: The remedy of the shipper would be, if he establishes that he had transported 100,000 cases of evaporated milk in this trade and paid a dollar or more per case, unless there is some mitigating factors—

The Court: Leave out all the factors. Take the case that I put: He's paying $1.00 a ton; they raise the rate, the Conference raises the rate to $2.00 a ton, but they don't get it approved and he pays it for a year, what does he do when he goes to the Commission?

Mr. Turk: If I was his attorney, I would ask for reparation in the amount of a dollar for every ton that I had shipped, and perhaps more. I think that it does depend, just as it would in an antitrust case, on whether his damage is the exact equivalent of this enhancement of the price.

[fol. 166] Now, if he were able to pass on to his customers that dollar—

The Court: Maybe that's the answer.

Mr. Turk: Yes. I think that the important thing here is that there is no necessity to prove any other unlawfulness under any other section of the Shipping Act.

And if you examine the A.U.T., the American Union Transport case, there was some reference to—

The Court: Well, if he has a remedy for that violation, then of course, your argument is that since he has the remedy, he's got to go to the Commission, and to the extent that he has a remedy, the Antitrust Laws—

Mr. Turk: Are superseded.

The Court: —are superseded. Those are the cases.

Mr. Turk: That's exactly—

The Court: I'm just trying to get the answer to the very small question that I put to you, namely, whether there was some invalidity to the point that I raised.

Mr. Turk: We read it as a question and not as a point.

In answering it, I say to Your Honor, his Complaint does allege a violation of Section 15 for which a reparation may be awarded.

The Court: Yes, and you say that—

Mr. Turk: And that the violation consists of the carrying [fol. 167] out of this agreement by the addition of $2.50 per ton to the evaporated milk rate, and to the extent that Carnation was damaged by that, he can get reparation from the Federal Maritime Commission.

The Court: Yes. And you would say that damage which he is getting, and that would be the only measure that could come from a violation at this particular time, that that would deemed to be damage caused by the violation of the Act?

Mr. Turk: Clearly.

The Court: Well, maybe you're right. Caused by the violation of the Act, even though it be assumed that if the Act had been complied with in this respect, he would have paid the same thing.

Mr. Turk: Exactly.

The Court: Well, maybe that's the answer.

Mr. Turk: There's one other question that was under discussion with Mr. Hood, as to what there might be for determination by the Commission here, where we get before the Commission on a contested set of facts—

The Court: Then you're getting away ahead of me. All I've got is the Complaint here.

Mr. Turk: Yes. Well, I thought there was a colloquy between you and Mr. Hood as to what questions might be opened before—

The Court: I don't know. There might be a lot of ques- [fol. 168] tions opened there, but so far as I am concerned

with now, I'm dealing with the Complaint in the light of the point that, on what's pleaded here, primary jurisdiction if the Commission takes over.

Mr. Turk: We certainly would contend that it would be for the Commission to decide whether we are correct in stating that everything that our clients have done is within the scope of approval of that joint agreement that was approved. Now, that I think is basically an administrative question, to determine whether the agreement, which they did approve, enveloped all of these transactions.

COLLOQUY

The Court: All right.

Mr. Turk: Thank you, Your Honor.

Mr. Ransom: Your Honor, I think that the question that you have posed was solved. I'd like to say this, that I can understand Mr. Hood's position, representing as counsel for the Commission, because I was in that spot. I was the general counsel of the Commission for two years. And I would say that I as such an official might have had that, but I no longer do have any problem like that, and as far as I am concerned, unequivocably, unequivocably, Your Honor, that there would be reparations granted for a violation of Section 15, as for the sole violation being acting and carrying out an unapproved agreement. And I say that because I think the authorities which we cited to Your Honor support [fol. 169] me in that, both on what the Commissions have had and what the Court has said. In every case where there is a Section 15 claimed of a violation for Section 15, for carrying out an unapproved agreement, the same question can be posed.

If they had gone to the Commission and they had gotten approval, would not the parties have been in exactly the same position damage-wise? But would they then have a violation or a recoverable loss?

And every time there's ever had any kind of a Section 15 problem along these lines, that same question would be answered—would be posed, and the answer clearly is that the carrying out, the undertaking of this agreement, which

created the rate without getting approval, is the thing which caused the damage, and which gives the right to reparations without anything else. And I think—and I'm not going to take a great deal of your time. I think you have had it as far as the number of people, but I want to say that it is true that the Commission in deciding those kind of cases, has not actually discussed the problem which Your Honor has raised in their cases, but the mere fact that the Court and the Commission, without hesitation indicate that reparations are available for a Section 15 violation, really answers the problem. And I think—

The Court: Administratively the answer would be that they would be awarded the difference between what they [fol. 170] had paid and what they had been paying before the increase, if the increase was carried out without approval of the Commission. Is that the formula?

Mr. Ransom: Yes. And I think—the A.U.T. case, which is a bellwether for us from the very beginning—

The Court: What's the A.U.T. case?

Mr. Ransom: That's the American Union Transport case, the treble-damage case, the New York case, which in answer to Your Honor's question, we have gone—we've carried on further.

You will recall we carried it from the District Court up to the Circuit Court on the question as to whether or not you can be in court for treble damages if you haven't—if you are talking about the violation of an unapproved agreement. And they answered that, "No, you can't be in court." Then they sent it back to the Federal Maritime Board, and the first examiner of the Federal Maritime Board handled the case. And what the man was claiming was that here was an agreement that wasn't approved. They said, "We're not going to pay brokerage." And he says, "That's an illegal agreement, because it was not approved."

The examiner gave him reparations, and the Commission did not give him reparations, only because they said, "He hasn't earned it in the first place."

Now, he hasn't proven his damage, no matter what, in [fol. 171] any court. He couldn't prove his damage, because he didn't do the job of being the broker.

And neither the Court nor the Commission at any time—

The Court: He didn't buy the milk under the new rate, is that it?

Mr. Ransom: Yes.

And I would say that first of all, Mr. Dunne acknowledged he found no cases on this. We found, I think, five cases on it, which we have in our memorandum, precisely on the point of Your Honor's question, and in the first section of our memorandum, the A.U.T. case, the Kempner case and the Swift case, which I was frank to say involved violations other than Section 15, and in which no one said, "Well, if he had had it approved, he wouldn't have been damaged, and therefore he wouldn't have any reparations under Section 15 for carrying on unapproved agreements."

The Commission itself, from another case we have cited in here involving the Pacific Coast European Conference, stated unequivocably that a violation of Section 15 created a remedy under Section 22, and the case—the Muir-Smith case, which Mr. Dunne referred to—I do not say that that is a Section 15 case; it doesn't involve Section 15—but it involves the same situation.

They had a hearing on this rate. They found the rate was [fol. 172] perfectly reasonable, perfectly lawful, except that it hadn't technically complied with the rate figure requirements relating to a minimum.

The Commission nevertheless said, "You are entitled to your award of reparations for the time that rate was in effect, because you have violated the statute in a violation."

I think the question has been answered by the Commission and the Court, Your Honor.

The Court: I think that on that particular point, I may have been a little over analytical perhaps on the point. However, if there is a remedy, Mr. Dunne still makes the point that it would be an adequate one, and none of the usual factors have the primary jurisdiction of doctrine present. And I will go into those very carefully, but unless somebody else has something to add, I think we have covered the matter.

Would you care to comment?

Mr. Dunne: I only want to make one comment, Your Honor, and that is again, the American Union Transport case to which Mr. Ransome just referred.

The reason that case presented difficulties for the Court was—the reasons that no brokerage had been earned, were to be found in the regulation of the steamship brokerage business, by the Commission.

So that there the question of whether or not he had or he had not earned his brokerage turned on the administrative [fol. 173] question. That's not in our case.

I don't want to enlarge on this. The other cases—I mean, Mr. Ransome quite correctly said the Swift case involved none of the violations. They are very easily distinguishable.

Mr. Ransom: Do you want comment on that?

The Court: If you don't, you will fall off that chair.

Mr. Ransom: Thank you. I merely want to say on that, Your Honor, that the reason the man was not entitled to brokerage is because he hadn't secured the cargo for the ship, and that happened to be language used in a prior docket of the Commission.

But it was so obvious. I mean, it's a fundamental principle about earning brokerage, that that regulation, if it is a regulation, because the Commission formally decides it, has nothing whatever to do with the man having to prove something other than Section 15 to get reparations.

The Court: All right. I will check over your recent memos, and I'm sorry to have kept you all afternoon, but it won't do any harm.

Mr. Ransom: Thank you very much, Your Honor.

[fol. 174] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

MEMORANDUM OF OPINION—June 20, 1963

After careful consideration of the record and the briefs the Court has come to the following conclusions:

The Shipping Act, 46 USC Sec. 821, provides a remedy for any violation of the Act.

To carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act (46 USC Sec. 814).

This issue is tendered by plaintiff's complaint.

The Supreme Court has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy. *United States Navigation Co.* v. *Cunard*, 284 U.S. 474 (1931); *Far East Conference* v. *United States*, 342 U.S. 570 (1951); See also *American Union Transport* v. *River* [fol. 175] *Plate*, 126 F. Supp. 91 (S.D.N.Y. 1954), aff'd 222 F. 2d 369 (2d Cir. 1955); *Rivoli* v. *New York*, 167 F. Supp. 940, 943 (S.D.N.Y. 1956); *United States* v. *Alaska SS Co.*, 110 F. Supp. 104 (W.D. Wash. 1952).

Although plaintiff contends that these cases are narrower in their holding and effect than they seem to indicate, this

Court is of the opinion that these decisions of the Supreme Court and decisions of other courts following them, are well-established precedents for applying the doctrine of exclusive primary jurisdiction to the Shipping Act in the present case.

The motions to dismiss, therefore, are granted and moving parties will prepare, serve and present an order accordingly.

Dated: June 20th, 1963.

W. T. Sweigert, United States District Judge.

[fol. 176] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION,
Defendant-Intervener.

ORDER AND JUDGMENT OF DISMISSAL—June 25, 1963

The defendants' and intervener Federal Maritime Commission's Motions to Dismiss the Complaint on jurisdic-[fol. 177] tional grounds having been heard; briefs having been filed on behalf of plaintiff, defendants and intervener;

oral argument having been heard on April 8 and again on June 11, 1963; the cause having been taken under submission; and the Court having filed herein a Memorandum of Opinion granting said Motions to Dismiss on the ground that primary jurisdiction of the action is in the Federal Maritime Commission:

It Is Ordered, Adjudged and Decreed that plaintiff's action be, and the same is hereby dismissed.

Dated this 25 day of June, 1963.

George B. Harris, United States District Judge.

Approved as to form as provided in Rule 46:

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson, By: Arthur B. Dunne, Attorneys for Plaintiff, Carnation Company.

[fol. 178] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION,
Defendant-Intervener.

NOTICE OF APPEAL—Filed July 18, 1963

Notice Is Hereby Given that Carnation Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and final judgment of dismissal herein, dismissing the above entitled action, made and signed June 25 1963, filed herein on June 26, 1963, and entered in this action on June 27, 1963.

Arthur B. Dunne, Wallace R. Peck, James R. Baird
[fol. 179] Jr., William H. Birnie, Dunne, Bledsoe Smith, Phelps, Cathcart & Johnson (formerly Dunne, Dunne & Phelps), By Arthur B. Dunne, Attorneys for plaintiff-appellant, Carnation Company, a corporation, 333 Montgomery Street, San Francisco 4, California.

[fol. 180] Bond on appeal for $250.00 filed July 18, 1963 (omitted in printing).

[fol. 181] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

v.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants,

and

THE FEDERAL MARITIME COMMISSION,
Defendant-Intervener.

STATEMENT OF POINTS ON WHICH PLAINTIFF INTENDS TO RELY ON APPEAL (FRCP RULE 75(d)) AND DESIGNATION OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL (FRCP RULE 75(a))—Filed July 19, 1963

Whereas, the plaintiff herein, Carnation Company, a corporation, has appealed to the United States Court of Appeals for the Ninth Circuit from the order and judgment made herein on June 25, 1963, filed herein on June 26, 1963, and entered herein on June 27, 1963, dismissing the above entitled action, now, said appealing plaintiff, makes its concise statement of the points upon which it intends to [fol. 182] rely on the appeal, and designates the portion of

the record, proceedings and evidence to be contained in the record on appeal, as follows:

Statement of the Points Upon Which Plaintiff-Appellant Intends to Rely on Appeal

Plaintiff and appellant, Carnation Company, states the points upon which it intends to rely on appeal, as follows:

The district court erred in granting the motions to dismiss this action and in dismissing the action.

The district court erred in dismissing the action on the ground that it had no jurisdiction to proceed with the action and that exclusive primary jurisdiction and/or primary jurisdiction is in The Federal Maritime Commission.

The court erred in granting the application of The Federal Maritime Commission to intervene in this action.

The complaint herein states a claim upon which relief can be granted for threefold the damages sustained by plaintiff and its cost of suit, including a reasonable attorney's fee, on account of injuries suffered by plaintiff in its business and property by reason of violation, by the defendants, of the antitrust laws of the United States (and particularly sections 1 and 2 of the Sherman Act, Act of July 2, 1890, c. 647, 27 Stat. 209, §§ 1 and 2, as amended, (15 U. S. C. §§ 1 and 2)). Such relief is authorized by, and jurisdiction to grant such relief is conferred on the above entitled court by, § 4 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, § 4 (15 U. S. C. § 15). No impediment to the granting of such relief, and no reason why the court should not exercise such jurisdiction, is presented by any laws of the United States or otherwise, and more particularly no such impediment or reason is provided by, or results from, the Shipping Act of 1916, Act of September 7, 1916, c. 451, 39 Stat. 728, as amended, (46 U. S. C. § 801ff) or acts or executive orders in connection with the [fol. 183] establishment of the United States Shipping Board or any of its successor agencies, including the Federal Maritime Board and/or The Federal Maritime Com-

mission or any other agency charged with the enforcement of, or any functions under, said Shipping Act of 1916.

More particularly plaintiff and appellant will make the following points on appeal:

The court erred in holding that primary jurisdiction and/or exclusive primary jurisdiction of this action or to award to plaintiff any relief on account of the matter stated in plaintiff's complaint is in The Federal Maritime Commission or under the Shipping Act of 1916, as amended. The antitrust statutes have not been repealed, in whole or in part, by the Shipping Act of 1916, as amended, nor have any of the remedies provided for in the antitrust statutes been superseded or suspended by the Shipping Act of 1916, as amended, or by any remedy provided for in said Act, and any remedy provided in said Act is not adequate and will not give the full measure of relief to which plaintiff is entitled under the antitrust statutes. The Federal Maritime Commission does not have exclusive jurisdiction of the matters complained of by the plaintiff nor does the Shipping Act of 1916, as amended, provide the exclusive remedy for the matters of which plaintiff complains. Plaintiff's complaint does not present any administrative question nor any question which, under the doctrine of primary jurisdiction or otherwise, should be or must be submitted to The Federal Maritime Commission before the above entitled court should exercise its jurisdiction of this action, and if there were it would warrant only a stay not dismissal. The above entitled court should proceed to the adjudication of this cause, whether or not any matter alleged by plaintiff constituted violation by the defendants, or any of them, of the Shipping Act of 1916, as amended.

Plaintiff, on appeal, will further make the point that none of the grounds of motion of defendants or of defendant-intervener stated in their motions to dismiss are well taken. [fol. 184] Plaintiff-appellant, as a point on appeal, will urge that defendant-intervener has no interest in this action, that granting its motion for leave to intervene was in

error and that plaintiff-appellant's objections to intervention by defendant-intervener should have been sustained.

Points Which Will Not Be Raised and Matter Which Will Not Be Designated

The plaintiff-appellant will not raise any question as to due and proper service by defendants' and defendant-intervener's papers and, accordingly, will not designate for inclusion in the record proof of service of such papers. Plaintiff-appellant will not claim that the motions of defendants and defendant-intervenor were not timely and, accordingly, will not designate for inclusion in the record stipulations extending time.

Plaintiff-appellant will make no point of want of notice of hearing or opportunity to be heard and, accordingly, will not designate for inclusion in the record stipulations and orders for time of hearing or filing of memoranda.

Plaintiff-appellant will not make any point that the papers of defendants and defendant-intervener were insufficient to raise and present the question upon which the court ruled and, accordingly, will not designate for inclusion in the record any of the briefs or memoranda of defendants or defendant-intervener although the same may be referred to in motions.

Plaintiff-appellant will not make a point that anything which occurred at the hearings is material to the determination of this appeal and, accordingly, will not designate for inclusion in the record any stenographic report of proceedings at the hearings, nor will plaintiff-appellant make any point that any factual material was before the court upon the determination of the motion to dismiss except such as appears from the complaint and the affidavit of Thomas Lisi and its attachments proffered by defendant-intervener and this will be designated for inclusion in the record on appeal.

[fol. 185]

Designation of the Portions of the Record, Proceedings, and Evidence to Be Contained in the Record on Appeal

Plaintiff-appellant designates the portions of the record, proceedings and evidence to be contained in the record on appeal as follows:

1. Copy of the clerk's docket entries.

2. Endorsement of filing of all documents hereafter designated (including on the affidavit of Thomas Lisi the endorsement of the filing of the memorandum to which it was attached). Proofs of service of documents are to be omitted.

3. The plaintiff's complaint.

4. Motion to dismiss of defendants, members and former members of the Far East Conference etc., and notice of hearing dated February 28, 1963 and filed March 1, 1963 including the attached schedule of defendants on whose behalf this motion is made but excluding the attached memorandum, and other attachments.

5. Motion to dismiss of Pacific Westbound Conference and other defendants, and notice of hearing dated March 1, 1963 and filed March 1, 1963 but excluding the attached memorandum and other attachments.

6. Motion of The Federal Maritime Commission to intervene as defendant and notice of hearing filed March 1, 1963, but excluding attachments.

7. Intervener's answer lodged March 1, 1963.

8. Motion of The Federal Maritime Commission as defendant-intervener to dismiss, and notice of hearing filed March 1, 1963, but excluding attachments.

9. Affidavit of Thomas Lisi (attached to memorandum of defendant-intervener (filed March 1, 1963) with attachments, noting that a duplicate with attachments, was also

attached to a memorandum of Pacific Westbound Conference et al. filed March 1, 1963.

[fol. 186] 10. Plaintiff's objection to motion of The Federal Maritime Commission for leave to intervene as defendant, filed March 21, 1963.

11. Order (by Hon. W. T. Sweigert) dated and filed April 30, 1963.

12. Memorandum of opinion (by Hon. W. T. Sweigert) dated June 20, 1963 and filed June 21, 1963.

13. Order and judgment of dismissal (by Hon. George B. Harris) dated June 25, 1963, filed June 26, 1963 and entered in the docket June 27, 1963.

14. Plaintiff's notice of appeal.

15. Plaintiff's cost bond on appeal.

16. This statement of points on appeal and designation of record.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Cathcart & Johnson (formerly Dunne, Dunne & Phelps), By Arthur B. Dunne, Attorneys for plaintiff-appellant, Carnation Company, a corporation, 333 Montgomery Street, San Francisco 4, California.

[fol. 187] Proof of Service (omitting in printing).

Certificate of Service by Mail (omitted in printing).

[fol. 188] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Civil Action No. 41153

CARNATION COMPANY, a corporation, Plaintiff,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Defendants.

APPELLEES' DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL (FRCP RULE 75(a))—Filed July 29, 1963

In addition to that portion of the record specified by plaintiff in its designation filed and served on July 19, 1963, the above-captioned defendants hereby designate the following portions of the record, proceedings and evidence for inclusion in the record on appeal:

1. Memorandum in support of motion to dismiss filed March 1, 1963, on behalf of defendants Pacific Westbound Conference et al including copy attached thereto (and marked "Appendix B") of the table of contents of hearing counsel's opening brief in Docket No. 872 before the Fed-
[fol. 189] eral Maritime Commission. Other attachments to this memorandum have already been designated by plaintiffs.

2. Memorandum in support of motion to dismiss filed March 1, 1963, on behalf of common carriers by water, members and former members of, the Far East Conference,

including copy attached thereto of notice of investigation and hearing, served October 30, 1959, by the Federal Maritime Board in Docket No. 872.

3. Memorandum in support of defendant-intervener Federal Maritime Commission's motion to intervene filed March 1, 1963.

4. Memorandum in support of defendant-intervener's motion to dismiss filed March 1, 1963. The attachments thereto have already been designated by plaintiff.

5. Intervener's answer filed March 1, 1963.

6. Plaintiff's memorandum in opposition to motions to dismiss filed March 21, 1963.

7. Reply memorandum of the Far East Conference and members and former members thereof, filed April 3, 1963.

8. Defendant-intervener's reply memorandum in support of motion to dismiss filed April 3, 1963.

9. Reply brief of defendants Pacific Westbound Conference et al, filed April 3, 1963.

10. Transcript of hearing before the Honorable W. T. Sweigert, United States District Judge on April 8, 1963.

11. Memorandum of defendant-intervener, Federal Maritime Commission, on further argument, filed May 27, 1963.

12. Memorandum of defendants, Far East Conference and members and former members thereof on further argument, filed June 5, 1963.

[fol. 190] 13. Supplemental memorandum on behalf of Pacific Westbound Conference et al on a question raised by the court, filed June 5, 1963.

14. Plaintiff's memorandum on further argument of motion to dismiss filed June 5, 1963.

15. Transcript of hearing before Honorable W. T. Sweigert, United States District Judge, on June 11, 1963.

16. Appellees' designation of additional record filed July 29, 1963.

Defendants do not designate the remainder of the file, such as stipulations as to time and orders and stipulations dismissing certain defendants without prejudice.

Transcript of the two hearings designated for inclusion have been ordered from the Court Reporters and copies will be filed with the Court as soon as completed.

Dated: July 29, 1963.

Lillick, Geary, Wheat, Adams & Charles, By: William H. King, Attorneys for Defendants, 311 California Street, San Francisco 4, California.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Of Counsel, 120 Brodaway, New York 5, New York.

[fol. 191] Certificate of Service by Mail by Attorney (omitted in printing).

Receipt of Service (omitted in printing).

[fol. 192] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, et al., Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD MATERIAL TO THE CONSIDERATION OF THE APPEAL RECORD TO BE PROVIDED AGREEABLY TO RULE 10—Filed September 30, 1963

[fol. 193] Heretofore the appellant Carnation Company, a corporation, plaintiff in that certain action in the United States District Court for the Northern District of California, Southern Division, entitled and numbered "Carnation Company, a corporation, Plaintiff v. Pacific Westbound Conference, an unincorporated association, et al., Defendants, and The Federal Maritime Commission, Defendant Intervener" Civil Action No. 41153, appealed to the above entitled court from the order and judgment made in said action on June 25, 1963, filed therein on June 26, 1963 and entered therein on June 27, 1963 and said appeal has been docketed in the above entitled court shortly entitled as above and numbered 18926. Now agreeably to Rules 10 and 17(6) of the Rules of the above entitled court appellant presents herewith a concise statement of the points upon which appellant intends to rely and a designation of all of the record which is material to the consideration of the appeal, and appellant elects to provide said record and

copies agreeably to Rule 10 of the Rules of the above entitled court.

I

Statement of the Points Upon Which Appellant Intends to Rely on Appeal

Appellant, Carnation Company, states the points upon which it intends to rely on appeal, as follows:

The court below erred in granting the motions to dismiss this action and in dismissing the action.

The court below erred in dismissing the action on the ground that it had no jurisdiction to proceed with the action and that exclusive primary jurisdiction and/or primary jurisdiction is in The Federal Maritime Commission. [fol. 194] The court below erred in granting the application of The Federal Maritime Commission to intervene in this action.

The complaint herein states a claim upon which relief can be granted for threefold the damages sustained by plaintiff (appellant) and its cost of suit, including a reasonable attorney's fee, on account of injuries suffered by plaintiff (appellant) in its business and property by reason of violation, by the defendants (other than intervener), of the antitrust laws of the United States (and particularly sections 1 and 2 of the Sherman Act, Act of July 2, 1890, c. 647, 27 Stat. 209, §§ 1 and 2, as amended, (15 U. S. C. §§ 1 and 2)). Such relief is authorized by, and jurisdiction to grant such relief is conferred on the court below by, § 4 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, § 4 (15 U. S. C. § 15).* No impediment to the granting of such relief, and no reason why the court below should not have exercised such jurisdiction, is presented by any laws of the United States or otherwise, and more particularly no such impediment or reason is provided by, or results from, the Shipping Act of 1916, Act of September 7, 1916, c. 451, 39 Stat. 728, as amended, (46 U. S. C. § 801ff) or

* Also 28 USC §§ 1331 and 1337.

acts or executive orders in connection with the establishment of the United States Shipping Board or any of its successor agencies, including the Federal Maritime Board and/or The Federal Maritime Commission or any other agency charged with the enforcement of, or any functions under, said Shipping Act of 1916.

More particularly appellant will make the following points on appeal:

The court below erred in holding that primary jurisdiction and/or exclusive primary jurisdiction of this action or to award to plaintiff (appellant) any relief on account of the matter stated in plaintiff's (appellant's) complaint is in The Federal Maritime Commission or under the Ship- [fol. 195] ping Act of 1916, as amended. The commerce involved in this action is foreign commerce. In respect of such commerce the antitrust statutes have not been repealed, in whole or in part, by the Shipping Act of 1916, as amended, nor have any of the remedies provided for in the antitrust statutes been superseded or suspended by the Shipping Act of 1916, as amended, or by any remedy provided for in said Act, and any remedy provided in said Act is not adequate and will not give the full measure of relief to which plaintiff (appellant) is entitled under the antitrust statutes. The Federal Maritime Commission does not have exclusive jurisdiction of the matters complained of by the plaintiff (appellant) nor does the Shipping Act of 1916, as amended, provide the exclusive remedy for the matters of which plaintiff (appellant) complains. Plaintiff's (appellant's) complaint does not present any administrative question nor any question which, under the doctrine of primary jurisdiction or otherwise, should be or must be submitted to The Federal Maritime Commission before the court below should have exercised its jurisdiction in this action, and if there were any such question it would warrant only a stay not dismissal. The above court below should have proceeded to the adjudication of this cause, whether or not any matter alleged by plaintiff (appellant)

constituted violation by the defendants, or any of them, of the Shipping Act of 1916.

Appellant will further make the point that none of the grounds of motion of defendants or of defendant-intervener (the appellees) stated in their motions to dismiss were well taken.

Appellant will urge that defendant-intervener (an appellee) has no interest in this action, that granting its motion [fol. 196] for leave to intervene was in error and that appellant's objections to intervention by defendant-intervener (an appellee) should have been sustained.

II

Points Which Will Not Be Raised and Matter Which Will Not Be Designated

The appellant will not raise any question as to due and proper service of defendants' and defendant-intervener's papers and, accordingly, will not designate for the record proof of service of such papers. Appellant will not claim that the motions of defendants and defendant-intervener were not timely and, accordingly, will not designate for the record stipulations extending time.

Appellant will make no point of want of notice of hearing or opportunity to be heard and, accordingly, will not designate for the record stipulations and orders for time of hearing or filing of memoranda.

Appellant will not make any point that the papers of defendants and defendant-intervener were insufficient to raise and present the question upon which the court ruled and, accordingly, will not designate for the record any of the briefs or memoranda of defendants or defendant-intervener although the same may be referred to in motions.

Appellant will not make a point that anything which occurred at the hearings is material to the determination of this appeal and, accordingly, will not designate for the record any stenographic report of proceedings at the hearings, nor will appellant make any point that any factual material was before the court upon the determination of the motion

to dismiss except such as appears from the complaint and the affidavit of Thomas Lisi and its attachments. Said affi- [fol. 197] davit with its attachments will be designated for inclusion in the record on appeal and by this designation it is identified as having been presented to the court below on appellees' motions.

III

Designation of the Record Which Is Material to the Consideration of This Appeal

Appellant designates the record, which is material to the consideration of this appeal, as follows:

1. Copy of the clerk's docket entries.

2. Endorsement of filing of all documents hereafter designated (except on the affidavit of Thomas Lisi). Proofs of service of documents are to be omitted.

3. The plaintiff's complaint.

4. Motion to dismiss of defendants, members and former members of the Far East Conference etc., and notice of hearing dated February 28, 1963 and filed March 1, 1963 including the attached schedule of defendants on whose behalf this motion is made but excluding the attached memorandum, and other attachments.

5. Motion to dismiss of Pacific Westbound Conference and other defendants, and notice of hearing dated March 1, 1963 and filed March 1, 1963 but excluding the attached memorandum and other attachments, except Lisi affidavit and attachments, No. 9 designated below.

6. Motion of The Federal Maritime Commission to intervene as defendant and notice of hearing filed March 1, 1963, but excluding attachments.

7. Intervener's answer lodged March 1, 1963.

[fol. 198] 8. Motion of The Federal Maritime Commission, as defendant-intervener, to dismiss, and notice of

hearing filed March 1, 1963, but excluding attachments except Lisi affidavit and attachments, No. 9 designated below.

9. Affidavit of Thomas Lisi (attached to memorandum of defendant-intervener, filed March 1, 1963) with attachments, and this will serve as a notation that a duplicate, with attachments, was also attached to a memorandum of Pacific Westbound Conference et al. filed March 1, 1963 and was presented to the court below on the motions to dismiss.

10. Plaintiff's objection to motion of The Federal Maritime Commission for leave to intervene as defendant, filed March 21, 1963.

11. Order (by Hon. W. T. Sweigert) dated and filed April 30, 1963.

12. Memorandum of opinion (by Hon. W. T. Sweigert) dated June 20, 1963 and filed June 21, 1963.

13. Order and judgment of dismissal (by Hon. George B. Harris) dated June 25, 1963, filed June 26, 1963 and entered in the docket June 27, 1963.

14. Plaintiff's (appellant's) notice of appeal.

15. Plaintiff's (appellant's) bond on appeal.

16. Plaintiff's (appellant's) statements of points on appeal and designation of record filed in the court below.

17. Appellees' designation of additional portions of record filed in the court below.

[fol. 199] 18. This statement and designation.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William H. Birnie, Dunne, Bledsoe, Smith, Phelps, Catheart & Johnson (formerly Dunne, Dunne & Phelps), By Arthur B. Dunne, Attorneys for appellant, Carnation Company, a corporation, 333 Montgomery Street, San Francisco 4, California.

[fol. 200] Proof of Service

Receipt of a copy of the foregoing Statement of Points etc. and Designation of Record etc. is hereby admitted this ..... day of ....., 1963.

Edward D. Ransom, William H. King, Lillick, Geary, Wheat, Adams & Charles, By .....
Attorneys for Appellees.

Certificate of Service by Mail (omitted in printing).

[fol. 202]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Pope & Jertberg, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
April 6, 1964

This cause coming on for hearing, Mr. Arthur B. Dunne, argued for the appellant, Mr. Edward D. Ransom, argued for the appellee Pacific Westbound Conference, et al., Mr. Elkan Turk, Jr., argued for the appellee Far East Conference etc., and Mr. Robert B. Hood, Jr., Attorney, Federal Maritime Commission, argued for the appellee Federal Maritime Commission, thereupon the Court Ordered the cause submitted for consideration and decision.

[fol. 203]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Pope & Jertberg, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—July 30, 1964

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[fol. 204]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, FAR EAST CONFERENCE and the FEDERAL MARITIME COMMISSION, et al., Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPINION—July 30, 1964

Before: Chambers, Pope and Jertberg, Circuit Judges.

Pope, Circuit Judge.

On December 5, 1962, the appellant Carnation Company filed in the court below its complaint against Pacific Westbound Conference and Far East Conference, and numerous individual shipping lines, members of those conferences, seeking recovery of treble damages under the antitrust acts[1] on account of damages claimed to have been suffered by Carnation through an alleged unlawful combination fixing prices and rates for shipment of Carnation's manufactured products to the Philippine Islands, pursuant to agreements among them which had not been filed with or approved [fol. 205] by the Federal Maritime Commission.[2] This ap-

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[1] Jurisdiction was invoked under Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. Secs. 1 and 2), Section 4 of the Clayton Act (38 Stat. 731, 15 U.S.C. Sec. 15) and Secs. 1331 and 1337 of Title 28, U.S.C.

[2] Sec. 15 of the Shipping Act, 1916, (46 U.S.C. Sec. 814) as it read on the dates involved in this action, provided that common carriers by water shall file with the Commission a copy of every

peal is from an order dismissing the action on the ground that the matters complained of were within the primary jurisdiction of the Commission.

Each of the defendant conferences had on file with the Maritime Commission an approved agreement of the kind referred to in Sec. 15 of the Shipping Act. Pacific Westbound Conference's approved agreement known as No. *57*, was designed, among other things, to carry out the purpose of that Conference to fix the rates at which conference members would serve shippers in foreign commerce westbound from Pacific Coast ports. The Far East Conference had a similar approved agreement designated as No. *17* on the records of the Commission. In addition, the members of the two conferences had another agreement providing for joint fixing of rates by both conferences, known as No. *8200*, which was approved on December 29, 1952. The burden of the complaint of Carnation is that a certain increased rate fixed and put into effect, relating to plaintiff's product and its rates for shipping over the routes traversed by the members of the Pacific Westbound Conference, was established between the members of both conferences, not pursuant to Agreement No. *57*, nor pursuant to Agreement No. *8200*, the approved agreements, but pursuant to another agreement which was not presented to or approved by the Commission. Accordingly, it is said the fixing of that rate was a per se violation of the Sherman Act. This forms the basis for Carnation's claim for treble damages.

Prior to the institution of the present action, on October 26, 1959, the Federal Maritime Board, predecessor agency

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agreement with another carrier fixing or regulating transportation rates or fares controlling or regulating competition, or providing for an exclusive preferential or cooperating working arrangement; the Commission was authorized to disapprove any such agreement which it found to be unjustly discriminatory or unfair or otherwise in violation of the Act but it was required to approve all other agreements; and it provided that "every agreement . . . lawful under this section shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

[fol. 206] to the Federal Maritime Commission,[3] ordered an investigatory proceeding entitled "No. 872, Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference" instituted pursuant to Sections 15, 16, 17 and 22[4] of the Shipping Act. The order directed that the Board "enter upon an investigation and hearing to determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Sec. 15, and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair," etc.

The Carnation Company on September 3, 1960, petitioned the Board for leave to intervene in that proceeding, and on September 8, following, leave so to intervene was granted.[5]

Hearing was had in this matter before an examiner and extensive sessions were held in San Francisco, New Orleans and Washington. The examiner filed an initial decision on

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[3] When the Shipping Act of 1916 was passed it vested its administration in the United States Shipping Board. By a succession of Executive Orders this board was succeeded first by the United States Maritime Commission, then by the Federal Maritime Board, and finally by the present Federal Maritime Commission.

[4] U.S.C.A. Sec. 821: "Complaints to Board and investigations. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

[5] Other parties, including some Pacific Coast ports, also intervened, on grounds not material here.

August 30, 1963, which is reported in 2 Pike & Fischer, Ship. Reg. Rep. 900. The issues presented at this hearing by Car-
[fol. 207] nation and others included in general the same matters and claims set forth in Carnation's complaint in this case.

The complaint alleges that in January, 1953, defendants met at Santa Barbara, California, and then and there secretly conspired and agreed to fix rates for transportation of commodities by members of the Pacific Westbound Conference from Pacific Coast ports of the United States to the Far East "not as provided in said Agreement No. 57 and not as provided in said Agreement No. 8200", and thereafter met and secretly renewed said association and agreement and agreed as follows: (a) Neither Conference nor any member thereof "should disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests;" (b) Both Conferences would fix and agree upon the rates for transportation of commodities by water by members of Pacific Westbound Conference in trade from Pacific Coast ports to the Far East including the Philippine Islands; and that the rate so fixed should be given out by Pacific West Coast "falsely pretending to act as such and under said Agreement No. 57;" (c) Pacific Westbound Conference, contrary to the provisions of Agreement 57 and Agreement 8200 would make no change in any rate established by it or fixed as aforesaid, without the concurrence of the Far East Conference with the exception of the commodities placed on a "list of initiative items", which did not include condensed or evaporated milk; that rates for evaporated milk were agreed upon and issued. The complaint further states that the Conferences and their members, acting pursuant to the agreement alleged, agreed to increase rates on evaporated milk from the United States to the Philippine Islands by $2.50 per ton, purportedly pursuant to the provisions of Agreement No. 57, and these rates were put into effect over the plaintiff's protest; that this was done pursuant to the above described secret agreement which was

never submitted to the Commission and that carrying it out was an unlawful combination and conspiracy in restraint of trade.

It was alleged further that in November, 1957, plaintiffs requested Pacific Westbound Conference to reduce such rate by $2.50 per ton to the rate previously established; that the Pacific Westbound Conference was willing to grant that [fol. 208] request subject to the concurrence of the Far East Conference; that the defendant Far East Conference declined to grant such concurrence; that in advising plaintiff of its denial of the request for reduction Pacific Westbound Conference represented that the members of that Conference, after long and careful study, though initially disposed to grant a reduction, denied the same; that this statement was false in that the request for reduction was in fact declined by reason of Far East Conference's refusal to concur in the reduction; and that plaintiff did not learn of these matters until disclosure thereof was made in May, 1961, in the course of the proceedings before the Commission which is described above.

It thus appears that prior to and at the time of the institution of this action the Commission had under investigation substantially the same question as that sought to be raised by the complaint filed under the antitrust laws. The Federal Maritime Commission was granted leave to intervene in this action in the court below. Intervener and all defendants moved to dismiss the action on the ground that the Shipping Act provided the exclusive remedy for the wrongs alleged in the complaint, and that the court was without jurisdiction to proceed.[6] The motion to dismiss was granted.

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[6] The motion asserted that the acts alleged in the complaint constituted charges of violations of provisions of the Shipping Act which, to the extent of such acts and charges, supersedes the antitrust laws, and that the remedy for such charges was that afforded by the Shipping Act; that the Court is without jurisdiction of the subject matter; that the practices adopted by the carrier in connection with the rates established by them are within the exclusive jurisdiction of the Federal Maritime Commission,

In dismissing the action, the court below relied upon the decisions in the cases of U. S. Nav. Co. v. Cunard Steamship Co., 284 U.S. 474, and Far East Conf. v. United States, 342 U.S. 570. It seems plain to us that both of these decisions support and require the action of the court below.

[fol. 209] In Cunard the action was brought by the Navigation Company to enjoin the respondent steamship companies from continuing an alleged combination and conspiracy in violation of the Sherman Act and the Clayton Act. The trial court there granted a motion to dismiss on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board under the Shipping Act of 1916. The bill there alleged that the defendant corporations were engaged in carrying 95 percent of the cargo trade from Atlantic ports of the United States to the ports of Great Britain and Ireland and those defendants and the plaintiff were the only lines maintaining general cargo services in that trade. It was charged that the defendants had entered into a combination and conspiracy to restrain the foreign trade and commerce of the United States in respect to carriage of cargo over the routes mentioned and with the object and purpose of driving the petitioner and all others not parties to the combination out of such trade and commerce. The conspiracy was said to involve the establishment of a general tariff rate and a lower contract rate, the lower rate to be made available only to shippers who agreed to confine their shipments to the lines of the defendants. These were alleged to be coercive measures not predicated upon differences in volume or frequency of service but rather to be wholly arbitrary.

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which is authorized to afford complete remedy with respect thereto. Attention was called to the proceeding then pending before the Maritime Commission in which substantially the same issues as those tendered by the complaint would be decided by the Commission. In support of its motion to dismiss, the Maritime Commission filed an affidavit by its Secretary setting forth portions of the record in its docket No. 872 previously mentioned.

It was conceded that looking to the Sherman Anti-Trust Act alone the bill stated a cause of action under Secs. 1 and 2 of the Sherman Act which would warrant an injunction under Sec. 16 of the Clayton Act unless the Shipping Act stood in the way. When the case reached the Supreme Court, that Court's opinion proceeded to state the provisions of the Shipping Act which it described as "a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (P. 480) After reviewing other decisions of the Court, and particularly the case of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, the Court affirmed the dismissal of the action upon the ground that the matter was "within the exclusive preliminary jurisdiction of the Shipping Board." [7]

[fol. 210] The Court reached this conclusion despite the allegation in the bill that the agreement in question had not

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[7] The Court said: "The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. . . .

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare Keogh v. Chicago & N.W. Ry. Co., supra, at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board." 284 U.S. at 485.

been filed with the Board pursuant to Sec. 15 of the Shipping Act. The Court stated (p. 486): "But a failure to file such an agreement with the board will not afford ground for an injunction under Sec. 16 of the Clayton Act at the suit of private parties . . . since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist." [8]

The Cunard case was followed by Far East Conf. v. United States, supra, decided in 1952. That also was a suit to enjoin alleged violations of the Sherman Antitrust Act [fol. 211] but it differed from the action in the Cunard case in that this suit was brought by the United States. The violation of the Act complained of was that the defendants, the Far East Conference, and its members, had entered into an agreement establishing a dual rate system. The defendants moved that the complaint be dismissed on the ground that issues involved should properly first be adjudicated before the Federal Maritime Board rather than a district court. The Court said: "We see no reason to depart from [Cunard]. That case answers our problem." [9] The Court characterized the rationale of Cunard as follows: (342 U.S. at 574) "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exer-

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[8] The reasoning by which the Court arrived at this conclusion, as stated in this quotation, includes a discussion of Sec. 15 of the Shipping Act. After referring to the agreements mentioned in that section the Court said: "Thereupon the board is authorized to disapprove, cancel or modify any such agreement, *'whether or not previously approved by it,'* which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' . . . . If there be a failure to file an agreement as required by Sec. 15, the board, as in the case of other violations of the act, is fully authorized by Sec. 22 supra to afford relief upon complaint or upon its own motion." (Emphasis added.)

[9] The fact that the suit was brought by the United States instead of by a private party was held no basis for distinction from the Cunard case.

cise of administrative discretion, agencies created by Congress by regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

As noted in the dissenting opinion in Far East, although the conference agreement was approved by the United States Shipping Board, that agreement did not contain any provision for dual rates. It was the dual rate aspect of the defendants' arrangement which was the basis for the Government's antitrust suit. The dissent argued that if the Board had expressly approved the dual rate system there would be immunity from the Sherman Act, but since the agreement as put in operation had not been fully approved, the Court should not hold that the exclusive primary jurisdiction was in the Board. The Court majority did not accept that contention. In Far East, as in Cunard, exclusive primary jurisdiction was in the Board or Commission not-[fol. 212] withstanding the questioned provisions of the agreement had not been approved by the Board.

Appellants here argue that neither Cunard nor Far East control this case, since it involves proceedings not to procure an injunction but to recover damages on behalf of a private corporation. There are two reasons why we reject that suggested distinction. In the first place, the considerations which make up the rationale of Cunard and Far East are fully as applicable in a treble damage suit as in one seeking injunction. Preliminary resort to the Commission is as necessary here in order to secure the uniformity of application of the Congressional scheme, and in order to procure resolution of the facts by a body having an adequate appreciation of the intricate business of transportation by sea.

As stated in Far East (342 U.S. at 574) the Cunard cas "applied a principle, now firmly established, that in case raising issues of fact not within the conventional experienc of judges or cases requiring the exercise of administrativ discretion, agencies created by Congress for regulating th subject matter should not be passed over." Later in thi opinion we shall note more fully why this is that sort c case; and it has such character no less because this suit i one for treble damages.

The second reason is the existence of authority to the co trary. The Second Circuit rejected an almost identical co tention in American Union Transport v. River Plate Brazil Conferences, 2 Cir., 222 F. 2d 369, where it affirme a dismissal of a treble damage antitrust suit on the distri court's opinion, 126 F. Supp. 91.[10]

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[10] Plaintiff in that case sued conference members for treble dam ages, alleging a conspiracy to restrain foreign trade by denyin payment to plaintiff of freight brokerage. The Board had juri diction under the Shipping Act to include the regulation of freig forwarders and brokers, and had done so. Defendants had put in effect their procedures pursuant to an unfiled and unapprove agreement. The opinion, so adopted, followed and applied Cunar and Far East, saying: "The failure to file an agreement, . . whatever other effect such failure may have, does not leave th offending parties 'at large', subject to the antitrust laws. If the is any inconsistency apparent between this conclusion and th language of Sec. 15 of the Shipping Act, as pointed out by M Justice Douglas, the clear language of the Supreme Court author tatively compels the decision. . . . Although the court is not aske for injunctive relief, it is not at all clear that judicial interventio in this field even to the extent of trying a case for damages woul not interfere with the uniformity of treatment and the regulator policy of the board based on specialized considerations withi its exclusive competence. . . . It appears indeed, that the plainti has filed a complaint with the board against the present defendan asking for reparations under Sec. 22 of the act and for a cea and desist order. It is unreasonable to suggest that the plainti may not seek relief from the board under that section, whic permits 'any person' to file a complaint. Consequently, a ca is presented within the exclusive primary jurisdiction of the Fe eral Maritime Board." 126 F. Supp. 93.

Since the argument in this case the Second Circuit has decide Trans World Airlines v. Hughes, ... F. 2d ....., (June 2, 1964

(footnote continued on following pag

[fol. 213] Appellants have attempted to demonstrate that the rule applied in Cunard and Far East would no longer be acceptable to the Supreme Court; that those cases have, because of later decisions, been interpreted to mean something different than what they seem to hold. This contention is one which we cannot accept. As late as 1963, in United States v. Philadelphia Nat. Bank, 374 U.S. 321, 353, the Court cited with apparent approval the Far East Conference case as holding that judicial abstention is required "where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." And as an inferior federal court we are not [fol. 214] about to make rulings based on any assumption that the Supreme Court is likely to repudiate its former decisions."

The question presented was whether certain conduct of the defendant charged to amount to an attempt to monopolize the business of selling aircraft and aircraft supplies, was immunized from antitrust recovery because of primary jurisdiction in the Civil Aeronautics Board. Holding that such primary jurisdiction did not exist the court noted that the acts charged in the Trans World Airlines case were not, as in Pan American World Airways v. U. S., 371 U.S. 296, "precise ingredients of the Board's authority," that the transactions charged were "unrelated to any specific function of the C A B," that the Board was given "no explicit jurisdiction" over such transactions, and that in any event the Board was without power to award money damages. Because of these circumstances the case clearly differed from that court's River Plate decision, which it did not even cite; and, for the same reason, it differs from the present case where the authority of the Maritime Commission is as broad as that stated in Cunard as follows: (284 U.S. at 487) "And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter . . . Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

" In Penfield Co. of Cal. v. Securities and Exch. Com'n, 9 Cir., 143 F. 2d 746, 749, this court said: "We cannot agree that an inferior federal court may make its prognostication of the weather in the Supreme Court chambers, however well fortified in judicial reasoning, and forecast that the Supreme Court 'seems' about to

We think that appellants' effort to assert the lack of con tinuing authority of Cunard and Far East is entirely falla cious and altogether unsupportable.[12]

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overrule its prior decisions, and outrun that Court to the over ruling goal. It is not a fanciful conjecture that, if such guessin contest were permitted, the ingenuity of judges, stirred by varie philosophies of governmental and social regulations, would fin rational arguments for overruling a score of Supreme Cour decisions. To the strain on the legal profession of many recen overrulings, some enumerated in the last paragraph of Smith v Allwright, 321 U.S. 649, . . . should not be added that of th overruling prescience of ten circuit courts of appeals and upward of ninety district courts."

[12] There is little point in attempting to spell out the manner i which this portion of appellant's argument proceeds. In genera outline it is as follows: In his dissent in the Far East Conferenc case, Justice Douglas took the position that exclusive primar jurisdiction in the Commission did not apply to unfiled agreement and that the dual rate agreement there involved was unapprovabl under Sec. 14 of the Shipping Act.

In Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, at 50 Mr. Justice Frankfurter, who had written the opinion in Fa East Conference, dissented from the majority opinion which hel that particular approved agreement providing for a dual rat system to be in violation of Sec. 14 of the Shipping Act, sayin (at 522): "In both cases [Cunard and Far East Conference] th Court's attention was directed to the claim of *per se* illegality. I both cases the plaintiffs urged that, since the dual-rate contrac system violated Sec. 14, the Board was without power to approv it. . . . And in *Far East Conference*, the claim that now prevai was a main ground of dissent." Appellant contends that wha Mr. Justice Frankfurter thus said in this Isbrandtsen case demon strates that the majority in Isbrandtsen were reversing and rejec ing Cunard and Far East Conference. It must be manifest tha appellant's attempt to draw that conclusion from a dissentin opinion must be a fruitless one. This was noted by Mr. Justic Harlan in a separate dissent in that case who disagreed with wha Mr. Justice Frankfurter's dissent said about Cunard and Far Ea Conference. The Isbrandtsen case had nothing to do with th present problem of exclusive primary jurisdiction in the Commi sion. That case reached the court of appeals and then went on t the Supreme Court on a petition to review a decision of the Feder Maritime Board. It had nothing to do with an attempted suit unde the antitrust laws; it dealt solely with the question of the legalit of a dual rate system. No issue relating to a dual rate system before us in the present case.

Ordinarily we would be content to rest this case upon the authority of the cases we have here cited. But because of the [fol. 215] vigor and earnestness with which appellant has argued that those cases are not controlling here, we now proceed to enumerate some of the reasons why we think the results reached in those cases were inevitable, and why the same conclusion as to exclusive primary jurisdiction in the Commission must be upheld here.

The Shipping Act's Pervasive Regulatory Scheme

In the first place, when we consider the powers and authority of the Commission, we must note that under the Shipping Act, as it was at the time of the matters alleged in the complaint, (and also as it is today), the Commission had, in contrast with the banking agencies in United States v. Philadelphia Nat. Bank, supra, (374 U.S. at 351) "regulatory and remedial powers." In contrast with the powers of the Federal Power Commission in California v. Fed. Power Comm'n., 369 U.S. 482, 485, those granted to the Maritime Commission composed a "pervasive regulatory scheme." The following summary of the provisions of the Shipping Act discloses the extremely broad range of regulatory powers, particularly as concerns shipping in foreign trade, vested in the Commission.[13] "The Act prohibits: (1) deferred rebates, (2) 'fighting ships,' (3) retaliation or discrimination against any shipper, and (4) unfair or unjustly discriminatory contracts with any shipper. A fine of not more that $25,000 for each offense is provided as the penalty for a breach of these provisions. If water carriers—other than citizens of the United States—violate the foregoing provi-

[13] Since the complaint here refers to acts and things alleged to have been done by the defendants between "before January, 1953" (including November, 1952) to and including May, 1961, we have chosen to describe the powers of the Commission under the Shipping Act as that Act existed prior to the amendments of October 3, 1961, Pub. L. 87-346, 75 Stat. 762. A consideration of the 1961 amendments would lead to no different conclusion than that we reach here.

sions or deny an American common carrier admission to a conference on equal terms with all other parties, the Secre- [fol. 216] tary of Commerce, upon certification by the Board, is empowered to bar vessels of the offending parties from United States ports.

"All agreements, understandings, conferences, or other arrangements between parties subject to the act which affect competition in any way, or changes in earlier agreements, must, according to Section 15 of the 1916 act, be filed with the Board. The Board, furthermore, may disapprove, cancel, or modify any such agreement or modification thereof deemed to operate to the detriment of United States commerce, to be in violation of the act or to be 'unjustly discriminatory or unfair' between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Approved agreements are exempted from the anti-trust laws. Violators are subject to a fine of $1,000 for each day of the offense.

"It is unlawful: (1) to give unreasonable preference to any person, locality, or description of traffic, or to subject any of the foregoing to undue disadvantage; (2) to permit by false billing, weighing, etc., transportation at less than regular rates; (3) to influence insurance companies to discriminate against a competitor; and (4) to disclose information detrimental to shippers or consignees. It is also unlawful for any shipper, consignor, or consignee to obtain or attempt to obtain by false billing, false weighing, etc., rates less than otherwise applicable. A fine of not more than $5,000 is provided for each offense.

"The charging of rates or fares that are 'unjustly discriminatory' between shippers or ports, or 'unjustly prejudicial' to United States exporters compared to their foreign competitors, is prohibited, and the Commission is empowered to alter rates which are in violation of this section. Reasonable regulations covering practices relating to receiving, handling, storing, or delivery of property must be observed, and the Board has authority to require the filing of reports, records, etc., of any person subject to the Act.

The Board is also authorized to investigate any violation of the act on its own volition, or upon the filing of a complaint. In the latter case full reparation for injury may be awarded if the complaint is filed within two years of the cause of action." [14]

[fol. 217] A key provision of the Act, significant here, is Sec. 15 (46 U.S.C. Sec. 814) which provides that common carriers and conferences thereof, such as the defendants in this case, shall file their agreements for regulating transportation or rates, or controlling competition, or providing for cooperative working arrangements, with the Commission. The section, as it read at the time here in question, is set forth in the margin.[15] In brief, it authorizes the Board

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[14] This quoted summary is from Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, pp. 106-107.

[15] "Sec. 814. Contracts between carriers filed with Board. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

(footnote continued on following page)

[fol. 218] to "disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it" that it finds to be unjustly discriminatory or unfair and the Commissioner is required to approve all other agreements. It makes such agreements lawful only when and as soon as approved by the Board, and makes it unlawful to carry out an unapproved agreement. It provides that agreements lawful under the section shall be excepted from the provisions of the antitrust laws and provides a penalty of $1,000 for each day of violation continuance.

Another key section is section 22 (46 U.S.C. Sec. 821) which is set forth in full in footnote 4, supra. It is this section which provides for the filing of complaints with the Commission alleging violation of the Act and asking reparation for the injury caused thereby. The Commission shall investigate complaints and shall make such orders as it deems proper; it is authorized to award full reparations to the complainant. The Board may on its own motion investigate any violation of the Act and make similar orders with respect thereto.

The Act provides for full hearing in relation to any complaint or proceeding pertaining to violations of the Act, for the keeping of records of the Board, and for publication of its reports; it authorizes enforcement of the orders of the Board by district court order, and provides for a review or

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Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

setting aside of orders by the appropriate court.[16] In the exercise of its "regulatory and remedial powers" to enforce the Act's "pervasive regulatory scheme", it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval, whether such agreements, if not filed, should nevertheless, now, in the language of the Cunard case, "upon a full consideration of all the attending circumstances, be approved or allowed to stand with modification." These are, as we shall more fully note hereafter, "precise ingredients of the [Commission's] authority." Pan American World Airways v. U.S., 371 U.S. 296, 305.
[fol. 219]

To Establish a Controlled System of Agreements Designed to Limit Competition

Another reason why we think it must have been the congressional intention, as held in the cases previously cited, that exclusive primary jurisdiction should rest with the Maritime Commission, is that the congressional objectives in the passage of the Shipping Act were entirely different from the objectives designed to be obtained through the antitrust acts. In the case of the latter, the congressional purpose was, as has been so often noted, to preserve, protect and enforce full and free competition. But the legislative history of the Shipping Act discloses that Congress had in mind in that enactment a very different objective due to the special problems of shipping lines in foreign trade which called for a special and different mode of regulation than that provided by the antitrust laws.

The Alexander Report[17] which led to the enactment of the

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[16] Since 1950 review of the Commission's orders is by courts of appeals under Chapter 19A of 5 U.S.C. Secs. 1031 to 1042.

[17] House Com. on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliation in the American Foreign and Domestic Trade, 4 H.R. Doc. No. 805, 63d Cong. 2d Sess. (1914) pp. 415 to 421.

Shipping Act, discloses that the object of the Act was to permit a controlled system of agreements designed to *limit* [fol. 220] competition.[18] In these respects it was similar to certain portions of the Federal Aviation Act, concerning which the Court said in Pan American World Airways v. U.S., supra, at p. 301: "Since 1938, the industry has been regulated under a regime designed to change the prior competitive system." The objective of limiting competition led to the provision in Sec. 15 that agreements lawful under 1-11 and 15 of Title 15."
1-11 and 15 of Title 15.'"

In Cunard the Court noted that the proper place to determine whether this special regime designed to change the

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[18] The Committee noted that it had been the almost universal practice for steamship lines engaged in the American foreign trade to operate under the terms of agreements or understandings which had for their purpose the regulation of competition through fixing or regulating of rates, apportionment of traffic, the pooling of earnings, or meeting the competition of non-conference lines. The Committee considered two alternatives: either the prohibition of such agreements with a view to "attempting the restoration of unrestricted competition" or recognizing such agreements and permitting them under circumstances which would eliminate abuses. The Committee noted the advantages and disadvantages of these alternative proposals, and concluded that the advantages which were substantial, "can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under government supervision and control." The Committee observed that "to terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership."

The Committee's recommendation was that the administration of the Act should be left to the Interstate Commerce Commission. That portion of the recommendation was not adopted; instead the Congress established the United States Shipping Board whose functions were later vested in the United States Maritime Commission, which in turn was succeeded by United States Shipping Board, which was in turn succeeded by the Federal Maritime Commission, the present intervener. See Historical Note at 46 U.S.C. 804.

prior competitive system should be effective was before the board.[19]

Under Direction of a Commission Specializing in Ocean Transportation

Another reason for our conclusion is that Congress, in setting up this elaborate system of controlled cooperation in respect to rates, shipping conditions, and other matters relating to carriers in foreign trade, and committing its regulation and enforcement to a special commission, contemplated that this commission would become familiar with the problems of foreign water-borne commerce and develop considerable expertise in connection therewith.

The Act lists many standards whose application requires more than ordinary familiarity with ocean transportation.[20] [fol. 221] Thus it seems appropriate to say that the Commission is the body most qualified to decide what agreements will, or will not, "operate to the detriment of the

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[19] Said the Court (284 U.S. at 487): "And whatever may be the form of the agreement and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

[20] Some of the phrases used are "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports . . . or to operate to the detriment of the commerce of the United States" (Sec. 15, referring to agreements to be disapproved); "any unfair or unjustly discriminatory contract with any shipper", "other discriminatory or unfair methods" (Sec. 14); "any other unjust or unfair device or means" (Sec. 16); "any rate . . . which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States", the Commission may "order enforced a just and reasonable regulation or practice" (Sec. 17); the carrier by water must establish "just and reasonable regulations and practices" (Sec. 18).

commerce of the United States." [21] As was said in Cunard, supra, (p. 487) "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

The Commission, so far as we are advised, has not yet acted upon the examiner's initial report; but that report discloses that the examiner has recommended the very thing suggested in the last quotation from Cunard—he has recommended that agreement No. 8200 be amended with changes to comply with his findings, "and that as amended Agreement No. 8200 should be reapproved." [22]

[fol. 222] It seems to us to be wholly inappropriate that a court and jury should, while this proceeding still pends,

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[21] Compare the following from Pan American World Airways v. U. S., at p. 309: "The 'present and future needs' of our foreign and domestic commerce, regulations that foster 'sound economic conditions,' the promotion of service free of 'unfair or destructive competitive practices,' regulations that produce the proper degree of 'competition'—each of these is pertinent to the problems arising under Sec. 411.

It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in Sec. 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under Sec. 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. Sec. 1486."

[22] The final paragraph in the examiner's report is as follows: "Based upon the whole record, it is concluded, ultimately, that Agreement No. 8200 has not operated to the detriment of the commerce of the United States or otherwise contravened Section 15 of the 1916 Act, but on the other hand it has been largely beneficial to such commerce; that it should be amended to incorporate the complete agreements found herein to be outside the scope of said agreement, with such changes made therein as will comport with the findings in this decision; and that as amended Agreement No. 8200 should be reapproved."

inject themselves into this matter and undertake to say what portions of the existing agreement are good and what parts are bad.

With a View to Uniformity in Regulation

Again, one prime purpose of the Shipping Act is to procure uniformity in the treatment of ocean carriers and their shippers. The Act is replete with provisions designed to avoid discrimination. See footnote 20, supra. To permit the maintenance of an action such as this would in our view produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid. We may assume that Carnation is not the only shipper who dislikes the rates fixed for shipment of its product. Carnation might win its suit and another similar concern, making a similar claim, might lose.

The undesirable results of a recovery by Carnation in such a case would be similar to those discussed by the Court in Keogh v. C. & N.W. Ry. Co., 260 U.S. 156, which was an action to recover damages alleged to have resulted from a combination to fix railroad rates in restraint of interstate commerce. The complaint alleged that certain uniform rates, fixed by an association of railroads, were arbitrary and unreasonable and higher than those theretofore charged and higher than they would have been if competition had not been eliminated. The rates complained of had been duly filed with and approved by the Interstate Commerce Commission. It was held that Keogh, a private shipper, could not maintain his action for damages, and the action of the lower court in dismissing the case, was affirmed. It was noted that the shipper had recourse under the Interstate Commerce Act to secure redress for damages [fol. 223] suffered in consequence of illegal rates. The Court said: "Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted,

with an additional remedy under the Anti-Trust Act?" The Court said: "This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under Sec. 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under Sec. 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." Since the Shipping Act vests the Commission with these extensive powers to investigate and bring to a halt the "unjustly discriminatory" and "unfair" acts prohibited and practices which "operate to the detriment of the commerce of the United States", it may be said here, in the language of Pan American World Airways, supra, "if the courts were to intrude independently with their construction of anti-trust laws, two regimes might collide."

This necessity of attaining uniformity in the administration of a regulatory system such as here involved, was noted by Mr. Justice Brandeis in Gt. No. Ry. v. Merchants Elev. Co., 259 U.S. 285, 292, where speaking with reference to the functions of the Interstate Commerce Commission in relation to the construction of tariffs, he said that where a controversy involves any more than a pure question of law "the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained."

Extending Also to Foreign Carriers

Another reason why Congress must have intended to leave the resolution of the problems here present to this specialized commission is that the Shipping Act regulates

not merely American shipping companies but foreign carriers as well. As noted by Marx,[23] the majority of [fol. 224] shipping conferences are international in the sense that they consist of companies under various national flags. An examination of the list of defendants in this suit will disclose that a very large percentage of them are carriers operating under foreign flags and are foreign owned. Those carriers which are not American but which operate on routes between the United States and foreign countries are through the Shipping Act subject to a degree of regulation by this American Commission. The situation is to a degree similar to that mentioned in Pan American World Airways v. United States, supra, at p. 310, where the Court said: "Furthermore, many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations . . ."[24]

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[23] Marx, International Shipping Cartels: A Study of Industrial Regulation by Shipping Conferences, 1953, p. 137.

[24] The Alexander Committee was not unmindful of this situation. Its report (V. 4 p. 416) stated: "The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

That the regulation of these conferences does indeed involve delicate foreign policy considerations is apparent from incidents in current history. As reported in the New York Times of July 16, 1964, under Reuters dispatch from London, "Transport Minister Ernest Marples assailed the United States Maritime Commission for 'acting as if the United States has the right to regulate the affairs of the world as a whole'". He offered a bill authorizing British ministers to order British ship lines "not to comply with American and other foreign shipping laws that the ministers consider an infringement on British jurisdiction." He was quoted as saying: "The Federal Maritime Commission claims the right to dictate to traders and shipowners in this country the form of contracts between them regardless of who owns the ships and where the contract is being negotiated."

All of Which Calls for Administrative Experience and Special Knowledge

In its essence, the appellant's case is tied to its construction of the decision of the Court in Gt. No. Ry. v. Merchants Elev. Co., supra. Says the appellant: "As a matter of decision this case is controlled by Great Northern R. Co. [fol. 225] v. Merchants Elevator Co., above, the case on which Cunard principally relied. This is an even simpler case. In that case there was a question of construction of a tariff. There was no need to resort to the Commission because that was a question of law. In the case at bar there is no need for construction of a tariff at all. We make a case without regard for the tariff terms, because we are concerned only with the illegal charge of $2.50 per ton above the lawful tariff whatever that tariff is."

In our view the case thus relied upon by the appellant has no relation to the problem here before us. That case had nothing to do with any problem arising under the Shipping Act. It was a simple action to recover sums paid the railway company alleged to have been collected in violation of the carrier's tariff. The sole question was whether Rule 10 of the tariff, as filed, called for a reassignment charge of $5 a car for 16 cars of corn which were shipped from Iowa and Nebraska to a station in Minnesota where they were inspected and then rebilled to a station beyond. The sole question was what did the tariff provide and what did its text mean. As an apparent effort to suggest that the present case is like the Great Northern case, appellant asserts that this is "a simple overcharge case." We must disagree.

The whole thrust of the complaint in this case is that the defendants entered into agreements which differ from or were modifications of their filed and approved agreements, such as their Agreement 8200; that the agreements so entered into were required by law to be filed with and approved by the Commission; that this was not done; that pursuant to these unapproved agreements rates were agreed upon and fixed, and that in consequence of the

failure to procure Commission approval, defendants were liable under the antitrust acts.

Cunard and Far East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under Sec. 22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan [fol. 226] v. Federal Maritime Com'n., 9 Cir., 314 F. 2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury.

The same is true of the alleged agreement not to disclose to any shipper how the members of the Conference voted on rate requests.[25] Of course the Commission may well, under its broad powers to prohibit conduct which it finds to be "unfair" or to "operate to the detriment of the commerce of the United States", adopt a rule requiring disclosure of votes at conference meetings; but a determination of that kind would represent the sort of action which may properly be committed to an administrative body rather than to a court or jury.[26]

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[25] We know of no present rule requiring meetings to be public. The Alexander report mentioned "the secrecy with which agreements and conferences are now conducted," (p. 417 of the Committee Recommendations) yet no effort was made in proposing the resultant legislation to prohibit such secrecy.

[26] The determination of such a policy question would necessarily take into consideration the problem of whether publication of votes

It is complained that the members of both conferences agreed that they would make no changes in rates which had been agreed to without the concurrence of both conferences. It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement "it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates."

The agreement provided that certain actions should be determined only by a concurrence of the two groups "with [fol. 227] respect to the establishment or change of rates." Obviously members of the Far East Conference carrying goods from Atlantic and Gulf ports would be affected by and interested in the rates from Pacific ports. Plainly that is why Agreement 8200 was made. The provision for joint action was eminently a reasonable one. Under Sec. 18 of the Shipping Act if the Commission found that any rate was unjust or unreasonable it could prescribe a reasonable maximum rate. This, again, is a matter for determination by the Commission. But, if the two Conferences agree to an increase of $2.50 per ton on evaporated milk, such was no more than a fixing of rates as contemplated in Agreement 8200. The Shipping Act sets up a system of industry self-regulation. No power to fix or specify rates was granted to the Commission or its predecessors. In contrast with the Interstate Commerce Commission (see 49 U.S.C. Sec. 15) the Maritime Commission does not fix rates. The rates were and are fixed by the Conferences under their approved agreement subject only to the power of the Commission just mentioned to set aside unjust or unreasonable rates.

It is also complained that the agreement contemplated that when the rates were announced Pacific Westbound Con-

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at meetings would be likely to result in the shippers granting their preferences in shipments to carriers who voted for rate reduction. That decisions of this kind are commonly "carefully kept business secrets" is noted in Marx, supra, p. 141. We are not aware of any Commission ruling on this subject.

ference would falsely pretend to act under its Agreement No. 57. The terms of Agreement No. 57 are not in this record. Presumably it, as do most conference agreements, authorizes the fixing of rates by the Conference. Conceivably the Maritime Commission could establish a rule requiring such a conference, when it files its rates and charges with the Commission pursuant to Sec. 18 of the Shipping Act, to specify precisely under which particular approved agreement it is operating when it fixes such rates. We know of no such rule and nothing appears to show that under either Agreement 8200 or Agreement 57 the Conferences have any obligation to specify which approved agreement they are relying upon in fixing a particular rate.

As for the claim that the defendant Conferences entered into a new agreement "contrary to the provisions of said Agreement No. 57 and said Agreement No. 8200" that a rate established or fixed by or for Pacific Westbound Conference and its members would not be changed without the concurrence of Far East Conference, we have for inquiry the question whether such an agreement was made in fact; [fol. 228] whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed with and approved by the Commission.

This calls for a reference to Agreement No. 8200 which was made a part of the record before the district court. We have noted that it expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates. Paragraph "second" of that Agreement was a provision that if either Conference should determine that conditions affecting its operations required an immediate change in its tariffs it could notify the other group specifying the changes it proposed to put into effect 48 hours after giving such notice, if given by telegram, or 72 hours, if given by airmail. It provided for the giving of a

summary of the facts which would justify such independent action.

At the times here in controversy there was nothing in the Shipping Act as it then stood or in the then regulations of the Commission requiring an insertion of such a stipulation in a Conference agreement.[67] The stipulation in this paragraph "second" was obviously inserted by voluntary action of the signatories to Agreement 8200. Its plain reading indicates that the exercise of this right of independent action is discretionary with the conference. Nothing contained therein compels utilization of that privilege and it would appear that the Commission, when it reaches this question, might well hold that the exercise of that privilege could be waived in any particular case; or, on the other hand, the Commission might well hold otherwise; and the Commission might hold with respect to the rate referred to in the complaint here that Pacific Westbound Conference merely waived its right to take that independent action as it then had the right to do. Furthermore, the Commission could well find that this waiver was a single [fol. 229] occurrence that there was no agreement never to use that right of independent action.[68]

The important point here is that these matters presented questions of fact and of policy properly for the specialized competence of the Commission. If the Commission finds that there was a mere temporary waiver of the independent

[67] When Sec. 15 was amended, Oct. 3, 1961, Pub. L. 87-346 Sec. 2, 75 Stat. 763, it contained a new provision that no agreement should be approved between carriers not members of the same conference unless "each conference retains the right of independent action."

[68] The examiner's report, previously mentioned, recited that Pacific Westbound Conference did in fact invoke its right of independent action on one occasion involving Korean relief cargo and one other occasion in reducing rates on Kraft liner board. This would seem to negative any agreement never to act independently. In the hearing before the examiner the Conferences' position was that their privilege of independent action should be employed only in "serious" or "important" situations.

action provision, and not a permanent alteration of the agreement, then it might hold that no filing of the new agreement would be required. The Commission has long recognized that not every arrangement or understanding between carriers must be filed for approval by the Commission."

We must therefore conclude that what is involved here is the conduct of common carriers by water whose "business involves questions of an exceptional character, the solution of which may call for a high degree of expert and [fol. 230] technical knowledge." (284 U.S. at 485) There is first the question of what did the Conferences here actually do. This should be decided, it seems plain, by the Commission which has already entered upon such an inquiry. The next question is whether or not what was done was of such character as to require the presentation for approval of a new agreement. Here we enter upon a matter "well understood by an administrative body especially

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" Its regulation, 46 C.F.R. Sec. 222.16, provides as follows: "Statements Not Accepted For Formal Filing. Statements of routine arrangements for carrying out authorized agreements will not be accepted for formal filing by the Board but may be received as information."

In an opinion by the predecessor shipping board, reported at U.S. Maritime Commission Reports Vol. 1, p. 121, consideration was given to the question as to whether the reference in Sec. 15 of the Shipping Act to the filing of "every" agreement was intended to include all arrangements made between carriers in the routine process of carrying out their conference agreements. The Board concluded that the agreements required to be filed are to be distinguished from the mere "routine" conference activities. If what we have here should be found by the Commission to have been a mere temporary waiver by Pacific Westbound Conference of its right of independent action in respect to the rate complained of in the complaint, then the Board might hold that no agreement of a character required to be filed had been entered into. That, however, is a matter for the expertise of the Commission. For a case involving the question of what constitutes a separate agreement required to be filed, see American Export & Isbrandtsen Lines, et al., v. Federal Maritime Commission, et al., (June 24, 1964) 9 cir., ____ F. 2d ____.

trained and experienced in intricate and special facts and usages of the shipping trade." U.S. Nav. Co. v. Cunard S.S. Co., supra, at p. 485.[30]

And finally, under the decisions and the Cunard and Far East Conference cases, even if it should be held that a new agreement had been made here which required approval of the board, the exclusive primary jurisdiction is in the Board and not in the district court.

There is one question in the background of this case which we need not meet at this time. Some doubt is raised in our minds by the language used in the concluding portions of Far East Conference where the Court said (p. 576): "Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the district court docket pending the Board's action, . . . or order dismissal of the proceeding brought in the District Court." The Court then went on to say "An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari . . . . If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application." The Court then proceeded to order the district court suit to be dismissed as was the complaint in the Cunard case, where the Court used the words "exclusive preliminary jurisdiction."[31]

[fol. 231] This language seems to suggest that there might be circumstances under which the final determination of the Commission would be such as to lay a groundwork for a later antitrust suit, perhaps where there had been a

[30] We note in the examiner's report, previously mentioned, the following: "It is further found and concluded that the requirement that both conferences concur in matters voted on by said conferences is authorized by the approved basic agreement, and therefore is not in violation of said Section 15."

[31] For a discussion of the difference between what is there called "primary exclusive jurisdiction" and "primary non-exclusive jurisdiction", see "Antitrust and Regulated Industries", 38 New York University Law Review, 604, 615.

complete and egregious failure even to attempt to comply with the Shipping Act.

On the other hand, in language which we have previously quoted, the Court in Cunard suggested that the intervening agreement there referred to "might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." We would assume that if such action were taken by the Commission no antitrust proceedings would be in order.

We do not find it necessary to resolve this question as to whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws.[32] We hold that we should under the circumstances of this case, follow the action taken by the Supreme Court in Far East Conference and approve the dismissal of the action by the district court.

The judgment is affirmed.

[fol. 232]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, FAR EAST CONFERENCE AND THE FEDERAL MARITIME COMMISSION, et al., Appellees.

JUDGMENT—Filed and entered July 30, 1964

Appeal from the United States District Court for the Northern District of California, Southern Division.

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[32] The only possible reason for allowing the action to be retained on the district court docket would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[fol. 233] [File endorsement omitted]

No. 18926

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, Appellees.

APPELLANT'S PETITION FOR REHEARING—
Filed August 27, 1964

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No. 18926

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, Appellees.

APPELLANT'S PETITION FOR REHEARING

The opinion rejects appellees' broad claims and recognizes that "there might ultimately arise out of the situation here presented a right to relief under the antitrust laws". This results if the agreement under attack is not immunized under the Shipping Act. But dismissal is affirmed because it is said this question must first go to the Commission. We suggest that whether in *this* case this is required under the criteria of *Cunard* or *Far East Conference* deserves further consideration. We present this petition for rehearing so that the Court (a) may correct what are believed, with deference, to be errors of law appearing on the face of the opinion and (b) may reconsider the cause in the light of the correction of these errors. References to the Court's opinion are to the printed slip-sheet copies of the opinion.

[fol. 236] I.

Errors of Law

1. The opinion (p. 24) states: "Under Sec. 18 of the Shipping Act if the Commission found that any rate was unjust or unreasonable it could prescribe a reasonable maximum rate", and that though "the Maritime Commission does not fix rates" it has "power * * * to set aside unjust and unreasonable rates". It also refers to filing "rates and charges with the Commission pursuant to Sec. 18 of the Shipping Act."

Section 18, before 1961, had no application to *foreign* commerce.[1] It applied only to "common carriers by water in interstate commerce".[2] However pervasive the *Act's* regulatory scheme may or may not be, it does not encompass *any* fixing of rates in *foreign* commerce by the Commission.[3] *Here* the scheme of regulation is only "a system

[1] As to "foreign commerce" ***FMB** v. Isbrandtsen Co.*, 356 US 481, 490, pointed out: "No power to fix rates is granted to the Board." To "prescribe a reasonable maximum rate" is "to fix rates". *Empire State Highway Tr. Ass'n v. FMB*, 291 F2d 336 (Cir. Dist. Col.), c.d. 368 US 931, has pointed out the difference here between foreign and interstate commerce. A hall-mark of "fully regulated industries" that they are "forced to charge only reasonable rates approved by the appropriate commission" (*U.S. v. R.C.A.*, 358 US 334, 346) is wanting in this case.

[2] The Act in § 1 (46 U.S.C. § 801), carefully distinguishes between carriers "in foreign commerce" and "in interstate commerce". The distinction, as to § 18, is highlighted by the 1961 amendment which renumbered the old section applying to carriers "in interstate commerce" as subdivision "(a)" and added a new subdivision "(b)" applying to carriers "in foreign commerce and every conference of such carriers".

[3] We do not overlook that "unjust discrimination" is prohibited. Discrimination could result whether rates are reasonable or unreasonable. But no discrimination was claimed. The increase of which Carnation complains applied to all shippers of evaporated milk. We did not have to present, and did not present, the issue presented in the Commission proceeding No. 872 whether Agree-

of industry self-regulation" (p. 24) through *approved* agreements which *only* in this way, by force of § 15, are removed from operation of the antitrust statutes.[4]

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[fol. 237] 2. The opinion is saturated with a mistaken idea that the Commission can still approve the side agreement of which Carnation complains and thus eliminate the illegality. The error is repeatedly articulated by quotation from *Cunard*, 284 US 474. It is said (p. 18) that Congress contemplated that the agency would develop "considerable expertise" and so (by quotation from *Cunard*) "it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, *be approved or allowed to stand with modifications.*" [5] In immediate sequence it is said that the examiner has recommended approval of Agreement No. 8200 after amendment. Again, in conclusion (p. 28), repeating this quotation from *Cunard*, the opinion adds: "We would assume that if such action were taken by the Commission *no* antitrust proceedings would be in order."

The language of *Cunard* as used in *Cunard* was proper. The only relief *there* sought was *prospective*,—injunctive relief against carrying out an unapproved agreement,—and approval would sweep away any foundation for relief operating in future, or a cease-and-desist order would obviate need for an injunction. For the same reason *Far East Conference* properly followed *Cunard*. But here approval cannot have *retroactive* effect and wipe out a fully accrued cause of action for damages for past unlawful con-

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ment No. 8200 was being carried out "in a manner which makes it unjustly discriminatory or unfair".

[4] "*Approved* agreements are exempted from the antitrust laws." *FMB v. Isbrandtsen Co.*, note 1 above.

[5] This quotation is repeated at the end of note 10 on page 10, toward the bottom of p. 15, and in note 19 on p. 17.

duct[6] (*River Plate etc. Conf. v. Pressed Steel etc. Co.*, 227 F2d 60 (Cir 2)) and the Commission cannot award the equivalent of Clayton Act relief. So far as *this* case is concerned passing on the agreement is not an ingredient of any Commission authority because there is no authority for retroactive approval[7] or to award treble damages. The

[fol. 238] court by taking jurisdiction in this action cannot "usurp" Commission authority for there is none to be usurped.

3. The Court's statement (p. 15) that on complaint the Commission can "award full reparations" under § 22 and on investigation "on its own motion" can "make similar orders" is in error as to reparations both (a) under the express provisions of § 22[8] and (b) in the sense that "full reparations" under the antitrust statutes include treble damages which the Commission cannot award.

4. As to "foreign commerce" the scheme of regulation by the *Act* is not all pervasive but, to the contrary, the

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[6] Indeed the PWC brief, note 31 p. 42, indignantly protested "We have never argued otherwise."

[7] The Commission cannot now, *as to the past,* use the *only* machinery which Congress provided as the means of permitting "a controlled system of agreements designed to *limit* competition." (Opinion p. 16) The "controlled system" was *only* one of approval in advance of action,—"*before* approval * * * *it shall be unlawful* to carry out in whole or in part, directly or indirectly, any such agreement" (§ 15). While it is true that the Shipping Act, like the Federal Aviation Act, is designed to change the prior competitive system as to *approved* agreement, we submit that likewise, as it was held in *Pan American World Airways, Inc. v. U.S.*, 371 US 296 under the Aviation Act, as to matters not brought under the Commission's power of action (rate fixing), the antitrust statutes still operate with full vigor where immunity has not been obtained in the only way provided for by Congress in the industry regulating statute.

[8] Quoted in Court's footnote 4. The Commission cannot make a money award where it investigates on its own motion.

scheme of the Act, as this Court itself at another point recognized, is in very large part "a system of industry self-regulation" (p. 24).[9] Accordingly, it becomes all the more important, in determining whether a claim is one for "exclusive primary jurisdiction", to heed the admonition of *United States v. Western Pacific R. Co.*, 352 US 59, 64

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[fol. 239] "to adhere to the disinctions laid down in *Great Northern R. Co. v. Merchants Elevator Co.*, supra, which calls for a decision based on the particular facts of each case." The system of industry self-regulation was of *approved* agreements leaving *unapproved* agreements subject to operation of the antitrust statutes under which the Commission has *no* functions to perform. *Congress* determined how possible collision of the two regimes was to be avoided by providing a method of excluding the antitrust regime by approval. No other method will do.

The distinction to which the Court, with deference, failed to adhere in the process leading to its conclusion at p. 11 was that between a claim based upon asserted violation of a regulatory provision of the statute (not our case) or upon a claim for relief which could be obviated by Commission action (as in *Cunard* and *Far East*[10]), matters within the area fixed for Commission action, and a claim such as that presented by Carnation where the *only* concern with the

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[9] The statement in *Cunard*, 284 US 474, 480, that the Shipping Act bears a relation to water carriage like that of the Interstate Commerce Act to carriage by land is correct in the sense that each is the industry regulating statute for an industry. But the schemes of regulation differ. The Interstate Commerce Act is one of complete regulation with breadth of application and detail of provision which leaves nothing by way of regulations to the industry itself. The basic scheme of the Shipping Act is different, at least as to rates in *foreign* commerce, and is self-regulation under approved agreements supplemented by a minimum of prohibition of certain specified unfair practices.

[10] Or where, as there, full relief could be given by the Commission, by a cease-and-desist order.

Shipping Act is that there was no approval which excluded operation of the antitrust statutes.[11]

II.

The Particular Facts of This Case

However true it may be that the Shipping Act lists many standards which require more than ordinary familiarity with ocean transportation (p. 17) we believe the opinion it-

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[fol. 240] self demonstrates that none of these are here involved.[12] In dealing with the specifics of this case the court notices only two questions in *this* case calling for determination:

(a) Whether the 1957 increase in rates was unlawful because put into effect by the parties "acting as alleged in

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[11] The distinction which the Supreme Court went out of its way to point out in *Panagra, Pan American World Airways, Inc. v. U.S.*, 371 US 296, that when the precise matter in issue did not fall within the area fixed for administrative action in applying the provisions of the industry regulatory statute there was room for full play of the antitrust statutes with their appropriate remedies.

[12] Nothing could make this clearer than this Court's own listing in footnote 20 of standards of unjustness, discrimination and reasonableness and its listing, by quotation from *Cunard* in footnote 7, of the considerations (familiar to experts but, so it is said, "generally unfamiliar to a judicial tribunal") necessary for application of these standards. We present no question calling for application of any such standards. We rely on an unapproved agreement which is no part of No. 8200. This case could not call upon the court to say whether any part of No. 8200 is good or bad, nor can the Commission saying that any part of it is good, modified or unmodified, have any retroactive effect to wipe out any part of prior antitrust violations.

Pan American World Airways, Inc. v. U.S., 371 US 296, *U.S. v. Western Pac. R. Co.*, 352 US 59, *Georgia v. Penn. R. Co.*, 324 US 439, and *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, to cite only a few of the cases, make it clear that *all* questions with respect to a regulated industry do not fall within the primary jurisdiction doctrine merely because some do.

paragraph 18 above" (under a secret unapproved side agreement) and

(b) The legality of continuing the increase after PWC determined that it should be reduced but refused a reduction for want of concurrence by FEC because of an unapproved agreement with FEC.

The Court answers that Agreement No. 8200 provided for "joint fixing of rates by both conferences" (p. 2); that what defendants did might be found to be "wholly within and authorized by the filed and approved agreements" (p. 23); that "No. 8200 contemplated joint action in establishment of rates." We believe, with deference, that the Court is in error;[13] that even if there is language which might

[fol. 241] possibly lend support to such a construction it is subject to the explicit reservation of the right of independent action in provision Second which applies to increase in rates as well as to veto of proposed reductions. But whether we are right or wrong about this, the question is, as the Court in fact came to treat it, a legal question of construction of an agreement and one for the courts not

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[13] The language first quoted at p. 23 is from the preamble only. The language next quoted—"with respect to the establishment or change of rates"—is, with deference, quoted out of context. It is in a sentence which refers only to the matters "coming before the *initial* meeting for consideration and action" and even then refers *not* to matters to be determined but only to the *way* in which each conference shall act i.e. each is to act "in accordance with the procedure prescribed by its respective Conference Agreement with respect to the establishment or change of rates." The opinion at p. 25 recognizes that this is the proper construction of the quoted language. This is made clear by paragraph 1 of the preamble which provides that "whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to *action* such as is required to effect the establishment or change of rates *pursuant to said Agreement No. 57*, as amended." Paragraph 2 is a like provision as to the Atlantic/Gulf Lines.

the Commission (*Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285), to be decided by the trial court in the first instance and not by this Court as a basis for sustaining the trial court's refusal to decide it. The question is not whether in the exercise of expert discretion an agreement should be approved but only what it means. It is a matter of construction that calls into play none of the considerations enumerated in *Cunard* as well understood (*sed quaere*) by a specially trained agency and generally unfamiliar to courts. It is a matter of every day diet of courts.[14]

As to the refusal to reduce the increased rate, it appears without contradiction that PWC determined the request for reduction should be granted, requested concurrence and when this was refused,[15] although No. 8200 Second expressly reserved the right of independent action,[16] withdrew the re-

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[fol. 242] quest "agreeably to the" improper side agreement alleged in paragraph 18 of the complaint.[17]

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[14] *Great Northern* is not to be put aside because there the question was one of construction of a railroad tariff and here it is one of construction of an agreement. Construction of agreements is certainly more a day-to-day concern with courts than is the construction of tariffs.

[15] After an exchange of 13 wires, if the factual showing is to be enlarged by the examiner's report.

[16] "Second" may not have been required by the Shipping Act before 1961 but it is clear that No. 8200 was not approved without it. Frank and explicit removal of it surely would have been a major modification requiring Commission approval and clandestine removal by an agreement to change only with concurrence should fare no better. The importance of the provision is pointed up by the 1961 amendment of the Shipping Act expressing the reservation of the right of independent conference action as a matter of Congressional policy.

[17] Compt. par. 25. Par. 26 further alleged that plaintiff's request "was declined by reason of the refusal of defendant FEC to concur" and that PWC statement that the action was by members of PWC was false.

It is said, however, that the "exercise of this right of independent action is discretionary"; that the Commission might hold this privilege could be waived in a particular case and that here PWC merely waived its right; that this was a single occurrence. It is noted in a footnote that on two occasions PWC acted independently and that this seems to negative an agreement never to act independently. The facts as alleged and undenied are to the contrary. But this does not present the question. The question is not whether PWC could act independently but whether PWC did *in fact* act independently or acted in pursuance of the unapproved conspiracy.[18] The latter is alleged and so far is not denied. If an issue should be made then we have the *classic* anti-trust question, for jury determination, under §§ 1 and 2 of the Sherman Act, —was defendant's conduct the result of its independent determination of a business problem or the result of an agreement? No special agency expertise is required for the resolution of this question. It is a typical jury question in antitrust cases. And if this Court is going to indulge in the very dangerous practice of going outside the record before it, it should notice that only the Korean incident occurred before the proceeding before the Commission was instituted (the Kraft liner board matter came later) and that *it* was a single instance of independent action although there had been from 1953 through 1959, 1666 occasions of contemplated change with requests for concurrence (714 requests by FEC and 952 by PWC), no other changes had been made without concurrence, many

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[fol. 243] were long delayed waiting concurrence, 161 were not made for want of concurrence and an additional 13 requests withdrawn. In such circumstances a single failure

[18] Any civil conspiracy case is one where what the defendants did any one of them could have done alone and without conspiring.

to honor the alleged secret side agreement does not negative its existence, or at least a jury could so find.[19]

Finally, if there is any possible question as to whether the unapproved side agreement was of the sort required to be approved the question is one of construction of the statute and of law for the courts (*Maryland & Va. Milk P. Ass'n v. U.S.*, 362 US 458, 468). As to past conduct there is no jurisdiction in the Commission to exercise its discretion to approve. With deference, the Court is in error in saying (p. 27) if a new agreement was made which required approval "exclusive primary jurisdiction is in the Board". To do what? Nothing it could do could breathe legality into what the statute (§ 15) declares to be illegal if done before approval.

It is respectfully submitted that the cause warrants further consideration by this panel or by the Court in banc.

Dated: August 27, 1964.

Arthur B. Dunne, Wallace R. Peck, James R. Baird, Jr., William R. Birnie, Dunne, Phelps & Mills, Attorneys for Appellant.

Certificate

I certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Arthur B. Dunne, Counsel for Appellant.

[fol. 244] Proof of Service by Mail (omitted in printing).

[fol. 245] Clerk's Certificate to foregoing paper (omitted in printing).

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[19] Conspirators are always at liberty not to honor their unholy alliance in any single instance.

[fol. 246]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Pope & Jertberg, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—September 28, 1964

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed August 27, 1964, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 247] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, Appellees.

OPINION ON PETITION FOR REHEARING—
Filed September 28, 1964

Before Chambers, Pope and Jertberg, Circuit Judges.

Appellant's petition for rehearing discloses a failure to note the main thrust of the opinion which holds that appellant's action in the court below was properly dismissed on the ground that the matters complained of were within the primary jurisdiction of the Federal Maritime Commission.

Appellant has failed to note that we said: (immediately following the reference to footnote 16 on page 15 of the slip opinion) "In the exercise of its 'regulatory and remedial powers' to enforce the Act's 'pervasive regulatory scheme', it is for the Commission to pass upon the following questions: whether the defendants did or did not make certain agreements, whether those agreements, if made were such as to require Commission approval. . . . " Again we discuss this matter at great length (beginning at the middle of [fol. 248] page 22 of the slip opinion, which will be the paragraph preceding West Publishing Company Key No. 5) where we said among other things: "Cunard and Far East Conference, as we have noted, both hold that failure of approval does not affect the Commission's primary jurisdiction. But even if it did, the question would remain as to whether what defendants did amounted to agreements which required Commission approval. And that is something for the Commission to decide. If it should decide that defendants have been acting under agreements which should have been filed, but were not, the Commission under §22 of the Act, could adjudge a violation of the Act, as in Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 9 cir., 314 F. 2d 928. And, of course, the Commission, as we shall note hereafter, might find the conduct of the defendants in respect to the rates mentioned in the complaint was wholly within and authorized by the filed and approved agreements. But in passing upon these matters the Commission must necessarily employ a specialized judgment and a determination of fact, policy and law, not within the conventional experience of a judge or jury." The point there made was discussed, both before and after the quoted language, at considerable length.

In short, we believe that the petition for rehearing is predicated upon a misunderstanding of our opinion. The petition is denied.

Richard H. Chambers, Walter L. Pope, Wilbert D. Jertberg, United States Circuit Judges.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18926

CARNATION COMPANY, a corporation, Appellant,

vs.

PACIFIC WESTBOUND CONFERENCE, FAR EAST CONFERENCE AND THE FEDERAL MARITIME COMMISSION, et al., Appellees.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Frank H. Schmid, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify this transcript of record in three volumes (volume one numbered from 1 to 125, volume two numbered from 1 to 72, and volume three numbered from 1 to 41) to be a full, true and correct copy of the entire record of the above entitled case in the said Court of Appeals, made pursuant to the request of counsel for the appellant Carnation Co., and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of September, 1964.

(Seal)

Frank H. Schmid, Clerk.

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SUPREME COURT OF THE UNITED STATES

No. 657—October Term, 1964

CARNATION COMPANY, Petitioner,

v.

PACIFIC WESTBOUND CONFERENCE, et al.

ORDER ALLOWING CERTIORARI—March 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.